89-576

No.

Supreme Court, U.S.
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JOSEPH F. SPANIOL, JR.
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IN THE

# SUPREME COURT OF THE UNITED STATES

October Term, 1989

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**RICHARD A. FREY, JR.**, Director,
Metropolitan Corrections Department,
**THERESA BANKS, VICKI WIMBS**,
Corrections Officers,
**WILLIAM P. ROSE** and **LARRY NAJJAR**,
Corrections Sergeants - - - - - Petitioners

*versus*

**KAREN B. MASTERS** - - - - - Respondent

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On Writ of Certiorari to the United States Court of Appeals
for the Sixth Circuit

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# PETITION FOR WRIT OF CERTIORARI

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## QUESTIONS PRESENTED FOR REVIEW

1. Are individual Jefferson County Jail employees protected by the qualified immunity defense established by *Harlow* v. *Fitzgerald,* 457 U.S. 800 (1982), where Plaintiff, a traffic misdemeanant, was strip searched in conformity with a U.S. District Court Consent Decree that endorsed strip searching all detainees when they are about to enter the Jefferson County Jail's security perimeter and come in contact with the Jail's general population?

2. Did the Sixth Circuit err in deciding the U.S. District Court Consent Decree endorsing Jefferson County's strip search policy had no preclusive effect on the Plaintiff's strip search claims?

## LIST OF PARTIES TO PROCEEDING BEFORE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

1. The names of the Appellants in the proceeding before the United States Court of Appeals for the Sixth Circuit were:

a) Bobby G. Crouch, Chief of the Jefferson County Police Department.

b) Officer Joseph Barrows, Jefferson County Police Department.

c) Officer Roger Calhoun, Jefferson County Police Department.

d) Richard A. Frey, Jr., Director, Metropolitan Corrections Department.

e) Theresa Banks, Corrections Officer, Metropolitan Corrections Department.

f) Vicki Wimbs, Corrections Officer, Metropolitan Corrections Department.

g) William P. Rose, Sergeant, Metropolitan Corrections Department.

h) Larry Najjar, Sergeant, Metropolitan Corrections Department.

Chief Crouch, Officer Barrows, and Officer Calhoun are not Petitioners in this action as their appeal was favorably resolved by the Sixth Circuit.

2. The Appellee in the United States Court of Appeals for the Sixth Circuit was Karen B. Masters, who is the Respondent in this action.

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1. *Masters* v. *Crouch, et al.*, No. 88-5477, Slip Op. (6th Cir. 4/18/89).

2. *Masters* v. *Crouch, et al.*, No. 88-5477, Order Den. Reh. En Banc (6th Cir. 7/14/89).

3. *Masters* v. *Jefferson County, et al.*, C87-0450-L(J), Memo. Op. and Order (W. D. Ky. 4/14/88) (Unpublished).

## STATEMENT OF JURISDICTIONAL GROUNDS

The Petitioners seek review of the judgment entered by the United States Court of Appeals for the Sixth Circuit in the case of *Masters* v. *Crouch, et al.*, No. 88-5477, Slip Op. (4/18/89). These Petitioners timely sought a rehearing en banc by the Sixth Circuit which was denied by order dated July 14, 1989. The Supreme Court's jurisdiction to review this Petition for Writ of Certiorari is invoked pursuant to 28 U.S.C. § 1254(1) and in conformity with 28 U.S.C. § 2101(c) and Supreme Court Rules 20 and 21.

## PERTINENT CONSTITUTIONAL PROVISIONS, TREATIES, STATUTES, ORDINANCES AND REGULATIONS

1. Fourth Amendment, United States Constitution.

   The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

2. Fourteenth Amendment, Section 1, United States Constitution.

   All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

3. 42 U.S.C. § 1983.

   Every person who, under color of any statute, ordinance, regulation, custom or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges or immunity secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. For the purposes of this section,

any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

No._____

IN THE

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RICHARD A. FREY, JR., Director,
Metropolitan Corrections Department,
THERESA BANKS, VICKI WIMBS,
Corrections Officers,
WILLIAM P. ROSE and LARRY NAJJAR,
Corrections Sergeants - - - - *Petitioners*

*v.*

KAREN B. MASTERS - - - - - *Respondent*

---

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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## PETITION FOR WRIT OF CERTIORARI

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*May it Please the Court.*

### STATEMENT OF THE CASE

On July 31, 1986, Karen Masters, the Respondent herein and the Plaintiff in the District Court, was cited for having an expired registration plate and for failing to maintain insurance on her automobile. After appearing twice in the Jefferson District Court, August 21 and September 25, 1986, the Plaintiff's third appearance date was scheduled for October 23, 1986, and she was given a reminder card reflecting only the Court division and date. This third appearance date, however, mistakenly was recorded by the Jefferson District Court Judge as being October 16 rather than October 23.

On October 21, 1986, Masters was arrested pursuant to bench warrants issued by the Jefferson District Court for her failure to appear on the erroneously recorded October 16, 1986 court date. Because she protested the

arrest and showed Officer Joseph Barrows of the Jefferson County Police Department the reminder card, Officer Barrow telephonically confirmed the bench warrants, placed Masters under arrest and made arrangements for Officer Roger Calhoun to transport Masters to the Jefferson County jail operated by the Metropolitan Corrections Department (hereafter, "Corrections Department").

Upon arrival at Corrections, Masters again protested her arrest and showed Corrections personnel her court reminder card. Masters was then frisked by Corrections officer Theresa Banks and placed in a holding room where, according to the Plaintiff, another female Corrections officer required the other women in the holding area to leave and made the Plaintiff open her blouse for a visual inspection. She was then fingerprinted and photographed before being returned to the holding area. At approximately 7:30 P.M. that evening, Masters was taken to the female section of the Corrections Department, which is within the security perimeter of the jail, where Corrections officer Vicki Wimbs conducted a strip search of the Plaintiff in a private room. Although no body cavity search occurred, Plaintiff was required to drop her underpants and expose her rectum after which she was given prison dress and placed in a cell where she remained until released on her own recognizance sometime later that evening.

On July 23, 1987, Masters filed a Complaint in the United States District Court for the Western District of Kentucky alleging a cause of action pursuant to 42

U.S.C. §1983 for her arrest, detention and strip search. In addition to claiming deprivation of her Constitutional rights under the Fourth, Fifth, Eight, Ninth and Fourteenth Amendments against the police officers, jail personnel and their governmental employers, Masters also asserted pendant state tort claims. After all Defendants answered in due course, they filed a joint motion to dismiss with a supporting memorandum asserting Masters had failed to state a claim upon which relief could be granted as to all Defendants and asserting the qualified immunity of the individual Defendants. Among other arguments proffered by Defendants, they asserted the individual Defendants were entitled to qualified immunity on Masters strip search claims and that such claims were precluded as to all defendants because of the Consent Decree entered in *Tate* v. *Frey,* U.S. District Court No. 75-0031-L(A) (hereafter, Consent Decree). The Consent Decree settled a class action suit against Jefferson County challenging numerous alleged constitutional frailties in the operation of the jail and included a detailed section on the use of strip searches. Masters also filed her own Partial Motion for Summary Judgment seeking a declaration the Corrections Department strip search policy was unconstitutional. By Memorandum Opinion and Order entered April 18, 1988, the trial court denied all aspects of the Defendants' Motion to Dismiss and the Plaintiff's Motion for Partial Summary Judgment.

The Defendants then filed a timely appeal of the trial court's decision; see, *Mitchell* v. *Forsyth,* 472 U.S. 511 (1985). The requisite briefs were filed by the parties,

oral argument was had and the Sixth Circuit issued its Slip Opinion on April 18, 1989. In sum, the Sixth Circuit determined all Defendants were protected by qualified immunity pursuant to the standard set forth in *Harlow* v. *Fitzgerald,* 457 U.S. 800 (1982), on Masters claims of unlawful arrest pursuant to the erroneously issued albeit facially valid arrest warrants due to the decision in *Baker* v. *McCollan,* 443 U.S. 137 (1979). The Sixth Circuit also held, however, the Corrections Defendants were not entitled to such immunity on Plaintiff's Fourth Amendment strip search claims even though the Sixth Circuit acknowledged the District Court had found Masters had been strip searched in accordance with the Consent Decree. Finally, the Sixth Circuit held there was no showing in the record before them the Consent Decree precluded Plaintiff from challenging the strip search policy of Jefferson County and remanded the case for further proceedings.

## ARGUMENT

**I. Are Individual Jefferson County Jail Employees Protected by the Qualified Immunity Defense Established by *Harlow* v. *Fitzgerald*, 457 U.S. 800 (1982), where Plaintiff, a Traffic Misdemeanant, was Strip Searched In Conformity with a U.S. District Court Consent Decree That Endorsed Strip Searching All Detainees When They are About to Enter the Jefferson County Jail's Security Perimeter and Come In Contact with the Jail's General Population.**

Petitioners' argument can be simply summarized. Because Plaintiff's strip search was performed according to the terms of a federal court Consent Decree governing jail operations, for purposes of the qualified immunity defense under *Harlow, supra,* Petitioners

were entitled to rely on the Consent Decree as justification for the strip search. Thus, in light of the Consent Decree, Petitioners, as a matter of law, could reasonably believe their actions were lawful; see, *Anderson* v. *Creighton,* 483 U.S. —, 97 L. Ed. 2d 523, 107 S. Ct. 3034 (1987); and conformed to this Court's Fourth Amendment standards for strip searches established in *Bell* v. *Wolfish,* 441 U.S. 520, 60 L. Ed. 2d 447, 99 S. Ct. 1861 (1979). Indeed, even the Sixth Circuit previously has held Jefferson County's strip search policy conforms to the Consent Decree and is constitutionally permissible in the context of another case involving a male misdemeanant pre-trial detainee whose strip search occurred under substantially similar circumstances as this case; see, *Dobrowolskyj* v. *Jefferson County,* 823 F. 2d 955 (6th Cir. 1987). Therefore, the Sixth Circuit's decision in *Masters* v. *Crouch,* No. 88-5477, Slip Op. (6th Cir. 4/18/89) denying qualified immunity to the individual Jefferson County jail Defendants not only is inconsistent with its prior decision in *Dobrowolskyj, supra,* but this Court's decisions in *Harlow, Anderson* and *Bell.*

As previously stated, the Petitioners assert the Sixth Circuit's ruling the individual jail Defendants are not entitled to the *Harlow* qualified immunity for Plaintiff's strip search is erroneous especially in light of this Court's subsequent decision in *Anderson, supra. Harlow* grants qualified immunity from liability to government officials if the Plaintiff's rights, either under the Constitution or the laws of the United States, were not clearly established at the time of a defend-

ant's challenged acts. Such objective standard simplified the application of the qualified immunity defense. In this regard, the *Harlow* Court noted:

> Reliance on the objective reasonableness of an official's conduct as measured by reference to clearly established law, should avoid excessive disruption of government and permit the resolution of many insubstantial claims on summary judgment. On summary judgment, the judge appropriately may determine, not only the currently applicable law, but whether that law was clearly established at the time an action occurred. If the law at that time was not clearly established, an official could not reasonably be expected to anticipate subsequent legal developments, nor could he fairly be said to "know" that the law forbade conduct not previously identified as unlawful. [footnotes omitted], *Harlow, supra,* at p. 818.

More recently, this Honorable Court again examined qualified immunity and closely scrutinized the standard of "clearly established law" in the case of *Anderson* v. *Creighton, supra.* In remanding the case for further consideration, the *Anderson* Court explained a plaintiff could not avoid the immunity defense merely by generally pleading an official's act constituted a deprivation of the plaintiff's rights guaranteed by the Constitution. In refining the definition when a right is clearly established, the Court stated:

> It should not be surprising, therefore, that our cases establish that the right the official is alleged to have violated must have been "clearly established" in a more particularized, and hence more relevant sense: The contours of the right must be sufficiently clear that a reasonable official would

> understand that what he is doing violates that right.

Further, in determining the Court of Appeals had erred by not applying the proper standard, the *Anderson* Court provided rationale which Petitioners believe is particularly critical to the instant matter:

> It simply does not follow immediately from the conclusion that it was firmly established that warrantless searches not supported by probable cause and exigent circumstances violate the Fourth Amendment that Anderson's search was objectively, legally unreasonable. We have recognized that it is inevitable that law enforcement officials will in some cases reasonably, but mistakenly conclude that probable cause is present, *and we have indicated that in such cases those officials - like other officials who act in ways they reasonably believe to be lawful - should not be held personally liable.* [citation omitted], (emphasis added) *Anderson, supra,* 97 L. Ed. 2d at p. 531.

In essence, then, the qualified immunity rule is meant to give public officials insight into when ". . . they reasonably can anticipate when their conduct may give rise to liability for damages. . .". *Davis* v. *Scherer,* 468 U.S. 183 at 195, 82 L. Ed. 2d 139, 104 S. Ct. 3012 (1984). Thus, in accordance with *Anderson, supra,* for the purpose of establishing whether the instant Petitioners are entitled to qualified immunity, it is necessary to examine the applicable law governing strip searches within the particularized and more relevant sense of the circumstances of the instant case.

The bedrock Supreme Court case setting the standard under the Fourth Amendment by which strip

searches are to be judged is *Bell* v. *Wolfish,* 441 U.S. 520, 60 L. Ed. 2d 447, 99 S. Ct. 1861 (1979). In that case, among other issues, this Court was asked to examine whether strip searches of pre-trial detainees after every contact visit from a person outside the institution could be conducted on a less than proable cause. In holding that strip searches including visual body cavity inspection was not violative of the Fourth Amendment in the context of the case, the Supreme Court established a balancing test to determine the reasonableness of a search under the Fourth Admendment:

> The test of reasonableness under the Fourth Amendment is not capable of precise definition or mechanical application. In each case, it requires a balancing of the need for the particular search against the invasion of personal rights that the search entails. Courts must consider the scope of a particular intrusion, the manner in which it is conducted, the justification for initiating it, and the place in which it is conducted. [citations omitted]. *Id.,* 441 U.S. at 559.

Thus, there are four elements to the test: (1) the scope of the search; (2) the manner in which the search is conducted; (3) justification for the search; and (4) the place the search is conducted. Within the context of the instant matter, three of the four elements are not the subject of real dispute; the scope, manner and place of the strip search.[1] The critical issue here which the Defendants believe has been erroneously determined

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[1]See, Plaintiff's First Amended Complaint, Para. 16, (App. 36a) and Affidavits of Corrections Officers Banks and Wimbs in Support of Motion to Defendants' Motion to Dismiss (App. 77a-80a).

by the District Court and the Sixth Circuit is the justification of the Plaintiff's strip search.

It has been the Petitioners' consistent position the justification for Respondent's strip search was automatically triggered by the terms of a consent decree approved by the United States District Court in the case of *Tate* v. *Frey,* No. 75-0031-L(A), "Stipulation of Settlement of Class Action" (hereafter "Consent Decree"), (W.D. Ky. 10/1/85), (App. 51a). The Consent Decree settled a class action suit against Jefferson County challenging numerous alleged constitutional frailies in the operation of the jail. Four separate subclasses were represented in the *Tate* v. *Frey* litigation, one of which was designated the "female pre-trial detainee" subclass as ". . . composed of all female prisoners who are now or will be confined in the Jefferson County Jail and are awaiting trial, and not serving sentence for any misdemeanor or felony conviction." *Tate* v. *Frey,* No. C75-0031-L(A), Order Certifying Class (W.D. Ky. 8/15/80) (App. 49a).

The *Tate* v. *Frey* litigation challenged jail conditions under the First, Fourth, Sixth, Eighth, Ninth and Fourteenth Amendments resulting in a detailed Consent Decree that included a specific section, Section XXIII, addressing the *Tate* Plaintiffs' Fourth Amendment concerns and requiring specific search policies to be followed by the jail. Specifically, the relevant portion of the Consent Decree pertaining to strip searches found in Section XXIII reads in pertinent part:

> The following general guidelines are incorporated into the jail search policies.

(a) All inmates under the control of the jail are subject to search at all times.

(b) Inmates will be searched by employees of their gender.

(c) All strip and body cavity searches will be conducted in private.

(d) *All inmates entering or leaving the security perimeter will be strip searched,* except inmates in the front holding areas who will only be strip searched upon reasonable belief that a strip search is required for security purposes as described in Item (g) below.

. .

(emphasis added) Consent Decree, Section XXIII, pp. 22-23 (App. 69a).

As the Plaintiff's First Amended Complaint indicates at paragraph 16 (App. 36a), in conformity with the affidavit of Corrections Officer Wimbs (App. 79a) filed in support of Defendants' Motion to Dismiss in District Court, Plaintiff's strip search occurred immediately prior to her entry into the security perimeter of the Jefferson County Jail in conformity with the above required jail search policies established by the Consent Decree. It is also critical to Petitioners' argument that the District Court found the Plaintiff was a class member bound by the Consent Decree[2], a fact implicitly acknowledged by the Sixth Circuit in their decision, *Masters* v. *Crouch, et al,* No. 88-5477, Slip. Op. at p. 4

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[2]*Masters* v. *Jefferson County, et al.*, C87-0450-L(J), Memo. Op. at p. 5, (W.D. Ky. 4/18/88), (App. 22a).

(6th Cir. 4/18/89) (App. 4a).[3] Thus, in conformity with both lower courts' findings in this regard, Petitioners were entitled to rely on the Consent Decree as justification for Plaintiff's strip search and, for qualified immunity purposes, they reasonably could have believed their actions did not violate the clearly established law of *Bell* v. *Wolfish*. To put it succinctly within the context of the particularized and revelant circumstances of this case as required by *Anderson*, to be deprived of qualified immunity, Petitioners would have to have understood clearly established law prevented strip searching minor traffic misdemeanants not merely in the general context of detention but in the specific context of a governing federal court approved consent decree which had established a jail's security needs such as to justify strip searching all who enter the jail's security perimeter.

No such clearly established law existed at the time of Plaintiff's arrest or at present. However, the pertinent clearly established law which does exist for the *Harlow/Anderson* inquiry is the Sixth Circuit's own decision in *Dobrowolskyj* v. *Jefferson County, supra.* There, as here, Dobrowolskyj was arrested on a misdemeanor charge and taken to the Jefferson County jail where, after a period of time, he was moved to the rear security area and subjected to a strip search just as the instant Plaintiff was when she was moved to the

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[3]There, the Sixth Circuit said:

"The district court found that the strip search was conducted pursuant to provisions of a consent decree previously entered by another division of the court in a class action, *Tate* v. *Frey*, W.D. Ky. No. 75-0031-L(A)."

female section. Subsequently, Dobrowolskyj sued the Corrections Department, its director and Jefferson County claiming that the County's automatic strip search policy upon movement into a security perimeter without a reasonable suspicion of contraband violated the Fourth Amendment. After a jury returned a verdict for the Defendants, Dobrowolskyj appealed to the Sixth Circuit which ruled Jefferson County's strip search policy conformed to constitutional requirements. In that regard, the Sixth Circuit specifically stated:

> We hold that Jefferson County's strip search policy is constitutional and, accordingly, affirm the rulings of the District Court.
>
> . . .
>
> . . . Dobrowolskyj was strip searched before he was moved to the rear area. The movement and search were in accordance with departmental policy which had been approved by the District Court in the *Tate* v. *Frey* Consent Decree. *Dobrowolskyj, supra* at p. 956.[4]

Thus, under circumstances substantially similar to the instant case, the Sixth Circuit explicitly approved Jefferson County's strip search policy of strip searching

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[4]As the Sixth Circuit noted in *Dobrowolskyj*, the relevant part of the Corrections Department policy conforming to the Consent Decree reads:

> All inmates will be thoroughly searched each time an inmate passes from one security area to another, being prepared for transportation both between floors and externally, and upon admission to the Department. All newly admitted inmates to the Department will be frisked searched upon arrival to the Department and strip searched immediately prior to the movement of the inmate to rear security, female section or other areas of the Department. *Id.*

inmates *when they enter a security perimeter.* As the Sixth Circuit noted:

> Second, and more important, Jefferson County's policy was not a blanket search of all detainees as in the policies held unconstitutional in the above cases, but a more narrowly drawn policy of searching only those detainees who are required, by force of circumstance, to be moved into the general jail population.
>
> The security interests of the jail in conducting a search at this point were strong. Dobrowolskyj was about to come into direct contact with the general jail population, including prisoners who would then be moved into all sections of the jail. The jail had legitimate interests in preventing the flow of contraband into the other sections of the jail. *Dobrowolskyj, supra,* at p. 959.

It is beyond cavil the above language from *Dobrowolskyj* comports with the Petitioners' analysis herein and they are entitled to qualified immunity in the particularized and relevant circumstances of the instant strip search. Yet, the Sixth Circuit's decision below inexplicably denied the Petitioners' qualified immunity and sought to distinguish its ruling in *Dobrowlskyj.*

To compound their error in this regard, the Sixth Circuit also erroneously analogized the Consent Decree strip search policy, i.e., strip searching upon entrance into a security perimeter, with cases from other jurisdictions involving *blanket* searches of all pre-trial detainees. At pages 10-12 of the Sixth Circuit's opinion in *Masters, supra,* they cite *Mary Beth G.* v. *City of Chicago,* 723 F. 2d 1263 (7th Cir. 1983); *Tinneti* v.

*Wittke,* 479 F. Supp. 486 (E.D. Wis. 1979), aff'd, 620 F. 2d 160 (7th Cir. 1980); *Logan* v. *Shealy,* 660 F. 2d 1007 (4th Cir. 1981), cert. denied sub nom. *Clements* v. *Logan,* 455 U.S. 942 (1982); *Hill* v. *Bogans,* 735 F. 2d 391 (10th Cir. 1984); and *Giles* v. *Ackerman,* 746 F. 2d 614 (9th Cir. 1984), cert. denied, 411 U.S. 1053 (1985), as authority that clearly established law *in other circuits* demonstrated the instant Plaintiff's strip search was unreasonable because of the minor nature of her offense and the fact there was no individualized reasonable suspicion of her carrying contraband. *Masters* v. *Crouch, supra,* at p. 14 (App. 14a).

The Sixth Circuit's emphasis on those foreign jurisdiction cases to the exclusion of its own previous decision in *Dobrowolskyj,* however, confirms the Sixth Circuit's misapplication of the qualified immunity standard in the instant case. Two critical factors relevant to *Dobrowolskyj* and the instant case manifestly distinguish them from the foreign strip search cases cited by the Sixth Circuit. First, and foremost, none of the cited cases involved a strip search conducted with the imprimatur of a federal court consent decree. Second, the searches in the cited cases, unlike the instant search policy of *all* pretrial detainees or were not conducted in private.

The case the Sixth Circuit found most similar to the instant matter, *Hill* v. *Bogans, supra,* cited at p. 12 of *Masters, supra,* (App. 12a), is a good example of the Sixth Circuit failing to consider the two distinguishing critical factors. In *Hill,* the plaintiff was stopped for an expired inspection sticker and was ar-

rested on an outstanding bench warrant that should have been cleared when the plaintiff had previously paid a fine for the underlying traffic violation. Despite his protests, he was taken to jail where he was subsequently subjected to a visual strip search before being intermingled with the general prison population. Unlike the instant case, the defendants in *Hill* were not acting pursuant to a consent decree which had established the security need justification for their strip search policy. Further, while acknowledging that intermingling with the general jail population is an important factor for the *Bell* v. *Wolfish* analysis, the *Hill* decision hinged on the fact Hill was strip searched in a room with 10 or 12 other detainees, *Hill, supra,* at pp. 394-395, a critical factor simply not present in this case. Thus, *Hill* does not qualify as clearly established law applicable to the case as it lacks the analogous relevant and particular circumstances required by *Anderson, supra.*

Having patently distinguished the authority relied on by the Sixth Circuit as being irrelevant in the particularized sense of this case, the inevitable conclusion is again demonstrated that *Harlow* and *Anderson, supra,* dictate Petitioners are entitled to qualified immunity. Other than the general balancing test for measuring the reasonableness of strip searches under the Fourth Amendment as established by *Bell* v. *Wolfish, supra,* the only clearly established law upon which Petitioners could be bound or which they could reasonably anticipate to be binding, was the Consent

Decree, and *Dobrowolskyj, supra.*[5] Therefore, the Sixth Circuit erred when it held contrary to the Petitioners' argument on the qualified immunity issue and, instead, focused its attention solely on the Consent Decree and *Dobrowolskyj* in the context of Petitioners' claim preclusion argument.

The Sixth Circuit's error in this regard can only be attributed to a misconception of the application of the qualified immunity standard as opposed to the imposition of liability on governmental entities for unconstitutional policies. The clear intent of *Harlow* and *Anderson* are to protect well-meaning public officials from liability in situations where the parameters of a plaintiff's right are not sufficiently clear such that a reasonable official would know his actions violate that right. If an official acts in a way he "reasonably believes to be lawful", *Anderson, supra,* 97 L. Ed. 2d at p. 531, he should not be held personally liable.

Having operated under the Consent Decree for a year prior to the incident here and having litigated the strip search issue under substantially similar circumstances in *Dobrowolskyj, supra,* it would certainly be an anomaly in the context of qualified immunity if the instant Petitioners were suddenly deprived of reliance on those two authorities, held personally liable for ac-

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[5]It cannot be gainsaid the Sixth Circuit's curious dismissal of *Dobrowolskyj* as applicable authority on the qualified immunity issue is puzzling. As previously noted, Dobrowolskyj was arrested on a minor offense, was strip searched under the identical circumstances as the instant case and pursuant to the same Consent Decree. The Sixth Circuit ignoring its own demonstrably analogous authority is simply inexplicable.

tions taken in good faith based on those authorities and told they should have anticipated their conduct would give rise to such liability. Such is the incongruity presented by the Sixth Circuit's opinion below, an opinion Petitioners assert conflicts with the protective purpose of qualified immunity enunciated in *Harlow* and *Anderson:* to protect conscientious public officials from personal liability and harassing litigation arising from the good faith discharge of their official responsibilities. Even if the Sixth Circuit is correct neither the Consent Decree nor *Dobrowolskyj, supra,* preclude Plaintiff's claims challenging the Jefferson County jail's strip search *policy,* such determination does not disqualify the individual Defendants from being dismissed on the basis of qualified immunity because they applied the policy to the Plaintiff. The reason lower level public officials should not be held liable in such context was succinctly stated in *Wallace* v. *King,* 626 F. 2d 1157, 1161 (4th Cir. 1980):

> On the other hand, law enforcement officials should not be held personally liable for monetary damages because they have followed the policy or the instructions of their superiors, where the controlling law had not been authoritatively decided by the Supreme Court, the appropriate United States Court of Appeals or the highest court of the state, where the officers have acted in good faith, and where the searches were conducted in a reasonable manner as shown by the evidence in this case. Insofar as the judgment below absolved the defendants from monetary liability to the plaintiffs, it should be affirmed.

Based on the foregoing analysis, the Sixth Circuit's decision below denying the individual jail Defendants qualified immunity patently conflicts with this Court's decision in *Harlow* and *Anderson, supra. Bell* v. *Wolfish, supra,* established the four factor test under the Fourth Amendment for the conduct of strip searches: (1) scope of search, (2) manner of search, (3) justification for the search, and (4) the place the search is conducted.[6] All four elements having been satisfied in the context of this case because of the Consent Decree, the individual jail Defendants are entitled to dismissal of Plaintiff's claims against them on the basis of qualified immunity. The Sixth Circuit's decision to the contrary based upon the supposed clearly established law of other jurisdictions generally holding blanket searches of minor traffic misdemeanants ignores the particularized relevant circumstances of this case.

First, Jefferson County's policy as established by the Consent Decree is *not* a blanket policy of strip searching traffic misdemeanants or, for that matter, any misdemeanants. Strip searches occur only for security purposes when any detainee is about to enter the jail's security perimeter and be intermingled with the general inmate population. Second, and more impor-

[6]Petitioners would observe *Bell* makes no mention of the nature of the detainee's charges as a determinative factor justifying a strip search and, instead, emphasizes the security needs of a secure detention facility. It is apparent to Petitioners that the authorities condemning blanket strip searches of minor offenders rely too heavily on the nature of a detainee's charges when in fact the circumstances of every case cited by the Sixth Circuit demonstrate the facility's security needs were not yet compromised or the strip search was not conducted in private.

tant, none of the cited cases involve governmental entities operating their jail and conducting strip searches under the authority of a federal court approved consent decree. Thus, there was no clearly established law with respect to strip searches conducted pursuant to a federal court approved consent decree *except* the *Tate* v. *Frey* litigation and *Dobrowolskyj, supra,* where the Sixth Circuit held the strip search policy at issue here to be constitutional within the context of a substantially similar case.

Further, regardless of the Sixth Circuit's present view of the Consent Decree strip search policy or the meaning of *Dobrowolskyj,* the individual defendants are still shielded by qualified immunity. To now deprive Petitioners of qualified immunity for having followed a policy approved by a federal district court and upheld by a prior analogous decision of the Sixth Circuit would set a precedent clearly in conflict with the teachings of *Harlow* and *Anderson.* The implications of such an anomalous precedent in the qualified immunity body of law would have universal adverse repercussions to lower level government employees operating any aspect of a governmental entity pursuant to a federal consent decree. No longer could they point to the approval of the challenged policy in the federal consent decree and avoid personal liability in a subsequent civil rights suit even if the plaintiff was a class member bound by the consent decree. Nor could governmental entities ever comfortably enter into a class action consent decree if any prospective member of the class could subsequently disavow its terms and chal-

lenge the constitutionality of a policy explicitly approved by such consent decree. Foreclosing the defense of qualified immunity in such circumstances certainly ". . . would destroy 'the balance that [the Supreme Court] cases strike between the interests and vindication of citizens' constitutional rights and in public officials' effective performance of their duties' by making it impossible for officials 'reasonably [to] anticipate when their conduct may give rise to liability for damages.' " [citation omitted]. *Anderson, supra,* 97 L. Ed. 2d at p. 530.

Due to the conflict between the Sixth Cirfcuit's decision below and this Court's decisions in *Harlow* and *Anderson, supra.* Petitioners pray this honorable Court to grant certiorari, reverse the Sixth Circuit and remand the case to them with appropriate instructions the individual Defendants are entitled to qualified immunity as a matter of law.

**II. Did the Sixth Circuit Err In Deciding the United States District Court Consent Decree Endorsing Jefferson County's Strip Search Policy Had No Preclusive Effect on the Plaintiff's Strip Search Claims.**

Petitioners also assert the Sixth Circuit erred in not giving preclusive effect to the Consent Decree with respect to Plaintiff's challenge to Jefferson County's strip search policy. Specifically, the Sixth Circuit held:

> To hold that the Consent Decree prevents Mrs. Masters from relying on the clearly established law relating to strip searches of traffic violators and other non-violent minor offenders would be to accord the Decree an unwarranted preclusive ef-

> fect. There is no showing of the record before us that any party in *Tate* v. *Frey,* was being detained in the Jefferson County jail for a traffic violation or similar non-violent offense. Nor is there any showing that the issue of the constitutionality of strip searches of such inmates was litigated in *Tate* v. *Frey* . . . The record in this case provides no basis for the Defendants' claim that Mrs. Masters is precluded from challenging the strip search. *Masters, supra* at p. 15.

Thus, despite the District Court's determination *Masters* was a member of the Consent Decree subclass comprising "female pre-trial detainees" and was bound by the Consent Decree; see, *Masters* v. *Jefferson County, et al.,* No. 87-0450-L(J), Memo. Op. at p. 5 (W.D. Ky. 4/18/88) (App. 22a); the Sixth Circuit ruled the Plaintiff was not a class member so bound and, further, the constitutionality of strip searches of detainees similar to Ms. Masters was not an issue in the consent decree litigation. As a matter of law, the Petitioners contend the Sixth Circuit was in error on both determinations.

In answer to the Plaintiff's First Amended Complaint, the Defendants asserted the Plaintiff was bound by the Consent Decree, thus precluding her strip search claims; see, Answer to First Amended Complaint, Para. 8, 10/29/87 (App. 44a). The Petitioners therefore, do not contest the general proposition that a party asserting the preclusion defense has the burden of establishing the defense; see, *United States* v. *Athlone Industries, Inc.,* 746 F. 2d 977 (1984). It is the Petitioners' position, however, that having pled the binding

nature of the Consent Decree on Plaintiff's strip search claims, the extent of the Consent Decree's application must be determined from the four corners of that document, *Firefighters Local Union No. 1784* v. *Stotz,* 467 U.S. 561, 104 S. Ct. 2576, 81 L. Ed. 2d 483 (1984). If the Consent Decree demonstrates Plaintiff was a member of a class bound by it and the Consent Decree litigation resolved the issue of strip searches, then the Consent Decree should be given preclusive effect just as an ordinary judgment entered by the court. *United States* v. *Jefferson County,* 720 F. 2d 1511 (11th Cir. 1983). The Consent Decree has been a critical part of the record in this case in both courts below and a cursory examination of its contents patently demonstrates its collateral estoppel effect on Plaintiff's claims. In that regard, Petitioners will demonstrate beyond cavil the Consent Decree was a final determination on the merits of the strip search policy issue, that the Consent Decree involved a subclass which included the Plaintiff and the instant litigation challenging the strip search policy is the same cause of action resolved by the Consent Decree; see, *United States* v. *Athlone Industries, Inc., supra,* at p. 983.

To determine whether the instant Plaintiff is a member of one of the four subclasses bound by the Consent Decree, it is only necessary to examine the "Order Certifying Class" entered in *Tate* v. *Frey,* No. C75-0031-L(A) (W.D. Ky. 8/15/80) (App. 49a).[7]

[7]This Order, as was the Consent Decree itself, was an exhibit to the Defendants' Motion to Dismiss in the District Court and was included in the Appendix before the Sixth Circuit, just as it is included in the Appendix to this Petition.

The very first subclass identified by that Order is denominated the "female pre-trial detainee" subclass which ". . . is composed of all female prisoners who are now, *or will be confined* in the Jefferson County jail and are awaiting trial, and not serving sentence for any misdemeanor or felony conviction. (emphasis added). As consistently argued by the Petitioners, and as determined by the District Court in its Memorandum Opinion at page 5 (App. 22a). When the Plaintiff was processed into the Jefferson County jail, she was a member of the "female pre-trial detainee" subclass such that she was bound by the Consent Decree. Obviously, until such time as the Plaintiff posted bond or was released on her own recognizance, she was confined to the Jefferson County jail and was awaiting trial on her misdemeanor traffic charges. Nonetheless, the Sixth Circuit took it upon itself to ignore the clear definition of the "female pre-trial detainee" subclass and unilaterally determine without any basis in the record before it that the Plaintiff was not a member fairly included in that class. *Masters* v. *Crouch, supra,* at p. 15 (App. 15a).

To compound their error, the Sixth Circuit went on to note the Consent Decree did not evidence ". . . that the issue of constitutionality of strip searches of such inmates [as plaintiff] was litigated in *Tate* v. *Frey.*" *Id.* The second paragraph of the Consent Decree, however, patently refutes this finding as it unarguably asserts the *Tate* v. *Frey* plaintiffs included Fourth Amendment search and seizure claims in their complaints. Such paragraph states:

> Plaintiff's Complaint herein, as amended and supplemented, charged in substance that inmates of the Jefferson County Corrections Department were being incarcerated under conditions which voilated the First, *Fourth,* Sixth, Eighth, Ninth and Fourteenth Amendments to the United States Constitution, in violation of Section 1983 and 1985 of the Title 42 of the United States Code, and in violation of State law. That as a result of such incarceration, Plaintiff and other members of the class were damaged. (emphasis added). *Tate* v. *Frey, supra,* "Stipulation for Settlement of Class Action," (Consent Decree) (W.D. Ky. 10/1/85) (App. 51a-52a).

Not only did the Consent Decree specifically reference the Fourth Amendment claims of the plaintiff class, but an entire section of the Consent Decree, Section XXIII, pp. 21-23 (App. . . .), is devoted to jail search policies. The record before the Sixth Circuit, is irrefutable the instant Plaintiff is both a member of the "female pre-trial detainee" subclass and the Consent Decree litigation undeniably resolved the Fourth Amendment strip search policy issue the Plaintiff here seeks to relitigate on the same statutory basis, 42 U.S.C. §1983.

Only where a party or a privy had not had an opportunity to litigate an issue is it a violation of due process for a litigant to be bound by a prior judgment; see, *Parklane Hosiery Company* v. *Shore,* 439 U.S. 322, 99 S. Ct. 645, 58 L. Ed. 2d 552 (1979). Otherwise, as succinctly stated in *United States* v. *Jefferson County, supra,* at pp. 1517-1518:

> The principals of res judicata and collateral estoppel apply to consent decrees as well as to ordinary judgments entered by a court. These doctrines prevent the attack of a prior judgment by parties to the proceedings and by those with sufficient identity of interest with such parties that their interests are deemed to have been litigated in those proceedings.

Federal Courts have historically viewed consent decree resolution of complex class action disputes, especially civil rights cases, as having a favored status in the law. As succinctly stated in a school desegregation case, *Armstrong* v. *Board of School Directors of City of Milwaukee,* 616 F. 2d 305, 312-313 (7th Cir. 1980):

> It is axiomatic that the federal courts look with great favor upon the voluntary resolution of litigation through settlement. [citations omitted]. In the class action context in particular, "there is an overriding public interest in favor of settlement." [citation omitted]. Settlement of the complex disputes often involved in class actions minimizes the litigation expenses of both parties and also reduces the strain such litigation imposes upon already scarce judicial resources.

The Seventh Circuit's rationale is equally applicable to tthe instant matter where Jefferson County settled a complex class action suit involving the operation of its jail. Petitioners having demonstrated from the Order Certifying Class and the Consent Decree in the *Tate* v. *Frey* litigation that the instant Plaintiff is a class member bound by the terms of such documents, the Sixth Circuit's decision to deny the preclusive effect of the Consent Decree cannot withstand superficial scru-

tiny. Indeed, the Sixth Circuit merely cites two cases, *Balbirer* v. *Austin,* 790 F. 2d 1524 (11th Cir. 1986) and *Spilman* v. *Harley,* 656 F. 2d 224 (6th Cir. 1981) for the simple proposition "a consent judgment cannot constitute collateral estoppel unless the party pleading collateral estoppel proves from the record of the prior case or through extrinsic evidence that the parties intended the consent judgment to operate as a final adjudication of a particular issue." *Masters* v. *Crouch, supra,* at p. 15 (App. 15a). Aside from the fact the record proves the Consent Decree is controlling and the strip search policy issue has been finally adjudicated, the Sixth Circuit cited authorities are wholly dissimilar to the instant case.

In the first instance, neither of the cases cited by the Sixth Circuit were class action consent decrees in the civil rights context as both merely involved bankruptcy proceedings and the dischargeability of certain debts previously the subject of state court judgments. Second, and more important, in neither case did the appellate court make a final determination of the preclusive effect of the proffered consent judgments and both courts remanded the cases to the district courts with specific instructions to determine from the respective records the extent to which the consent judgments should be given preclusive effect. Thus, even if the record before the Sixth Circuit in the instant case was insufficient to make a determination of the preclusion issue with respect to the Consent Decree, although Petitioners believe they have shown the record was more than adequate, the Sixth Circuit's own authority man-

dates the case be remanded to the District Court for a full examination of the preclusion issue. The Sixth Circuit's authorities, therefore, do not derive their holdings from the common nucleus of civil rights class actions as do the cases cited by Petitioners involving Title VII and school desegregation class actions. Further, the record before the Sixth Circuit is conclusive, even under a fair reading of *Balbirer* and *Spilman, supra,* that the instant Plaintiff is a member of a subclass bound by the Consent Decree and the issue of Jefferson County's strip search policy was finally adjudicated by that document.

Moreover, the Sixth Circuit's failure to accord preclusive effect to the Consent Decree is inapposite to the holdings of *Firefighters Local Union No. 1784* v. *Stotz, supra, U.S.* v. *Jefferson County, supra,* and *U.S.* v. *Athlone Industries, Inc., supra.* The application of the Consent Decree must be determined from the four corners of the document. Because the conditions and requirements contained therein demonstrate the Consent Decree was a final determination on a cause of action identical to the basis of the instant Plaintiff's strip search claims, as well as Plaintiff's membership in an affected class, the foregoing authorities require the Consent Decree be given preclusive effect just as any ordinary judgment entered by a court.

Finally, the Consent Decree must be given preclusive effect in light of the foregoing because to do otherwise would significantly deviate from the broadly accepted policy in complex federal class actions that the "overriding public interest" is best served by volun-

tary settlement through consent decrees because they minimize the parties litigation expenses and "reduce the strain such litigation imposes upon already scarce resources." *Armstrong, supra*, at pp. 1312-1313. Patently, the Sixth Circuit's decision below denies the Petitioners the very protection it sought by entering into the Consent Decree and certainly subverts the foregoing axiom universally accepted in the federal courts. Therefore, based on the foregoing authorities and arguments, Petitioners pray this honorable Court grant certiorari, reverse the Sixth Circuit's holding of the claim preclusion issue and remand this case to the Sixth Circuit with instructions to dismiss Plaintiff's challenge to the strip search policy as precluded by the Consent Decree.

## CONCLUSION

The Petitioners believe there are special and important reasons for granting certiorari in this case. The Sixth Circuit's decision denying the Petitioners the protection of qualified immunity directly conflicts with the holdings of this Court in *Harlow* v. *Fitzgerald, supra,* and *Anderson* v. *Creighton, supra.* It was incumbent upon the Sixth Circuit in deciding the qualified immunity issue to examine the clearly established law *within the particularized and relevant circumstances of this case.* Simply stated, Petitioners could not be denied qualified immunity unless they reasonably should have known it was clearly established that strip searches conducted pursuant to a consent decree recognizing the security needs of a jail did not

comport with the Fourth Amendment under the standards set forth in *Bell* v. *Wolfish, supra.*

In that regard, the Sixth Circuit could not ignore its own applicable legal precedent of *Dobrowolskyj* v. *Jefferson County,* where a minor misdemeanant had been strip searched under substantially similar circumstances to the instant Plaintiff and pursuant to the strip search policy established by the same Consent Decree. Pursuant to the authority of the Consent Decree and *Dobrowolskyj, supra,* it is manifest the Petitioners should have been granted immunity because to do otherwise would be contrary to the purpose of the immunity: to protect conscientious government officials from personal liability and harassing litigation when they have acted in a manner they reasonably believe to be lawful. *Anderson* v. *Creighton, supra.*

Further, Petitioners also argue certiorari should be granted to review the Sixth Circuit's error in failing to give preclusive effect to the Consent Decree on Plaintiff's challenge to the strip search policy approved by the federal court in that document. Such determination by the Sixth Circuit is a significant departure from the generally accepted axiom in federal litigation that consent decrees, especially those in the class action context serve an important public interest in reducing litigation expenses and alleviating the burden on judicial resources caused by such complex litigation; see, *Armstrong* v. *Board of School Directors of City of Milwaukee, supra.* The record before the Sixth Circuit clearly shows the Plaintiff was a member of a sub-class bound by the *Tate* v. *Frey* Consent Decree and that the

Fourth Amendment search issue now asserted by Plaintiff was fully litigated and determined by the terms of the Consent Decree. As a matter of law, Plaintiff should be estopped from pursuing this collateral attack on the terms of the Consent Decree.

For the reasons asserted herein, Petitioners respectfully pray this Court to grant certiorari in this case, reverse the Sixth Circuit and remand the case with instructions to grant Petitioners' judgment on their qualified immunity defense and to dismiss Plaintiff's challenge to the strip search policy as being precluded by the *Tate* v. *Frey* Consent Decree.

Respectfully submitted,

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## CERTIFICATE OF SERVICE

I hereby certify three (3) copies of this Petition for Writ of Certiorari were served this 4th day of October, 1989, upon Gregory A. Bolzle and Patrick W. Michael, WOODWARD, HOBSON & FULTON, 2500 First National Tower, Louisville, Kentucky, Counsel for Respondent, by depositing said documents in a United States Post Office mailbox, first-class postage prepaid, and addressed to the foregoing counsel of record at their above post office address, all in conformity with Supreme Court Rule 28.3. Pursuant to Supreme Court Rule 28.5, all parties required to be served with copies of this Petition have been served.

N. Scott Lilly

N. SCOTT LILLY
*Counsel for Petitioners*

# APPENDIX

RECOMMENDED FOR FULL TEXT PUBLICATION
See, Sixth Circuit Rule 24

# UNITED STATES COURT OF APPEALS

## No. 88-5477

## FOR THE SIXTH CIRCUIT

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KAREN B. MASTERS, - - - - *Plaintiff-Appellee,*

*v.*

BOBBY G. CROUCH, *et al.*, - - *Defendants-Appellants.*

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*On Appeal from the United States District Court for the Western District of Kentucky*

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Decided and Filed April 18, 1989

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Before: MERRITT and MILBURN, Circuit Judges; and LIVELY, Senior Circuit Judge.

LIVELY, Senior Circuit Judge. This action under 42 U.S.C. § 1983 presents two claims of constitutional violations in connection with the plaintiff's arrest and detention. The plaintiff's first claim is that the arresting officer and detention personnel violated her Fourteenth Amendment right not to be deprived of liberty without due process of law by failing to investigate sufficiently to determine whether a warrant for her arrest had been issued by mistake. Her other claim is that a strip search of the plaintiff at the Jefferson County jail was unreasonable, and therefore violated the Fourth Amendment. The defendants, officers and employees of Jefferson County, Kentucky, filed a motion to dismiss on the basis of qualified immunity and for failure

to state a claim. The district court denied the defendants' motion, and this appeal was brought pursuant to 28 U.S.C. § 1291. *Mitchell* v. *Forsyth,* 472 U.S. 511, 524-30 (1985). We affirm in part, reverse in part, and remand for further proceedings.

I.

The facts as stated in the complaint are treated as true. All events occurred in 1986. On July 31 Karen Masters, a resident of Jefferson County, received two traffic tickets—one for operating an automobile with expired registration plates, and the other for failure to maintain auto insurance. As directed by the citation, Mrs. Masters appeared before the Jefferson District Court at a neighborhood government center on August 21 at 7:00 p.m., and pled not guilty. After a second appearance the court directed her to appear before Division 102 of the District Court at the downtown justice center on October 23 at 9:00 a.m. A deputy sheriff in attendance gave the plaintiff a "reminder card" containing this information. However, the plaintiff's name did not appear on the card. By mistake, the judge who presided at the second appearance recorded the plaintiff's next appearance date as October 16 rather than October 23.

On October 21, at about 3:00 p.m. the defendant Barrows, a county police officer, arrested Mrs. Masters at her home for failure to appear in court on October 16. The plaintiff protested that her appearance date was October 23, not October 16, and showed Barrows the reminder card. The officer confirmed the existence of the arrest warrant for Karen Masters and refused the plaintiff's request to call an attorney. Officer Barrows took the plaintiff and her two young children in a squad car to the home of Mrs. Masters' mother, where the children were left. He then took the plaintiff to a public parking lot and delivered her to another officer who handcuffed her before transporting her to the hall of corrections. Throughout these events Mrs. Masters repeatedly advised the officers that there was a mistake

that she was not required to appear in court until October 23.

At the corrections building the plaintiff was required to remove her shoes and empty her pockets and then was "frisked" by a female attendant. While Mrs. Masters was in a "holding room" a different female attendant ordered her to open her blouse. This search occurred in front of a window in the holding room, in plain view of other persons. Approximately four hours after her arrest the plaintiff was handcuffed to another woman and taken to a room on the third floor of the Jefferson County jail. At that point, still another female attendant subjected the plaintiff to a strip search over her continued protestations of mistake. The plaintiff was required "to remove all of her clothing except her underpants and to turn around, drop her underpants, bend over and expose her rectum." After putting on a jail dress, the plaintiff was lodged in a jail cell with other persons. Later in the evening she was released on her own recognizance and ordered to report to court at 9:00 a.m. the next day. The following morning the presiding judge acknowledged the recording error that led to the issuance of the arrest warrant.

II.

In the U.S. District Court the plaintiff sought damages under § 1983 for alleged constitutional violations and under various state laws as pendent claims. She also requested a declaratory judgment and a permanent injuction to prohibit enforcement of the laws and policies under which she was arrested, detained and searched. The defendants' qualified immunity defense was based on their contention that at the time of the events complained of there was no "clearly established law" holding any of the defendants' acts unconstitutional.

The district court recognized that public officials and employees are immune from suits seeking damages under § 1983 for acts performed under color of law unless it has

been clearly established that such acts deprive the plaintiff of rights secured by the Constitution or laws of the United States. Interpreting Supreme Court authority exonerating an officer who executes an arrest warrant from making an independent investigation of *every* claim of innocence, the district court concluded that there is an implied duty to make an investigation in some cases. The court held that, in this case, because Mrs. Masters had documentary evidence that the warrant had been issued by mistake, the officer had a duty to investigate and verify the validity of the warrant.

The district court found that the strip search was conducted pursuant to provisions of a consent decree previously entered by another division of the court in a class action, *Tate* v. *Frey,* W. D. Ky. No. 75-00031-L(A). The consent decree, entered as a "Stipulation for Settlement of Class Action" on October 1, 1985, provided in paragraph XXIII that the defendant Jefferson County authorities agreed to establish policies addressing the search of inmates and inmates' property. It then set forth guidelines for those policies. The particular policy under which Mrs. Masters was searched provides:

> All inmates will be thoroughly searched each time an inmate passes from one security area to another, being prepared for transportation both between floors and externally, and upon admission to the Department. All newly admitted inmates to the Department will be frisked searched upon arrival to the Department and strip searched immediately prior to the movement of the inmate to rear security, female section or other areas of the Department.

The district court found that, in applying this policy, the defendants are required to balance the interest of a detainee in remaining free from the serious personal intrusion inherent in a strip search against the interest of the authorities in maintaining security within the jail. Since Mrs.

Masters was arrested and detained on minor traffic offenses not normally associated with weapons or other contraband, and no effort was made to determine whether any grounds existed for believing her movement from one area of the jail to another involved a security risk, the complaint stated a claim for relief. Applying objective standards, the court further found that the plaintiff's right not to be subjected to a strip search under the facts of this case was clearly established. Thus, the district court denied the defendants' claims of qualified immunity.

## III.

### A.

In *Harlow* v. *Fitzgerald,* 457 U.S. 800, 818 (1982), the Supreme Court held that "government officials performing discretionary functions, generally are shielded from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." The standard to be applied in deciding a claim of qualified immunity is one of "objective reasonableness." *Id.* The Court reiterated both the rule and the standard in *Davis* v. *Scherer,* 468 U.S. 183, 191 (1984), and added that "[n]o other 'circumstances' are relevant to the issue of qualified immunity." *Id.* Further refining the scope of inquiry to be conducted by a court in deciding a claim of qualified immunity, the Supreme Court cautioned in *Anderson* v. *Creighton,* — U.S. —, 107 S. Ct. 3034 (1987), against identifying a clearly established rule of law at a level of broad generality. Rather, the right allegedly violated must have been clearly established in a "more particularized, and hence more relevant, sense." 107 S. Ct. at 3039. The Court explained its "more particularized" requirement as follows:

> The contours of the right must be sufficiently clear that a reasonable official would understand that what he is

> doing violates that right. This is not to say that an official action is protected by qualified immunity unless the very action in question has previously been unlawful, see *Mitchell*, 472 U.S., at 535, n. 12, 105 S.Ct., at 2820, n. 12; but it is to say that in the light of preexisting law the unlawfulness must be apparent. See *e.g.*, *Malley, supra*, 475 U.S., at 344-345, 106 S. Ct., at ___-___; *Mitchell, supra*, 472 U.S., at 528, 105 S.Ct., at 2816; *Davis, supra*, 468 U.S., at 191, 195, 104 S.Ct., at 3017, 3019.

*Id.*

In describing the circumstances under which we will hold that a constitutional right is clearly established, this court has formulated a rule which requires us to look first to decisions of the Supreme Court, then to decisions of this court and other courts within this circuit, and finally to decisions of other circuits. *Ohio Civil Service Employees Ass'n* v. *Seiter*, 858 F.2d 1171 (6th Cir. 1988); *Robinson* v. *Bibb*, 840 F.2d 349 (6th Cir. 1988); *Davis* v. *Holly*, 835 F.2d 1175 (6th Cir. 1987).

B.

On appeal the defendants rely squarely on *Baker* v. *McCollan*, 443 U.S. 137 (1979), to negate the claim that the plaintiff had a clearly established right not to be arrested and detained without an independent investigation of her claim of mistake. In *Baker* the Supreme Court held that an officer making an arrest on the basis of a facially vaild warrant is under no duty "to investigate independently every claim of innocence." *Id.* at 145-46.

Agreeing with the district court, the plaintiff argues that the reminder card setting her appearance in Jefferson District Court for October 23 was documentary evidence supporting her claim of mistake. This evidence, the plaintiff maintains, was sufficient to take her case outside the general rule that such an investigation is not required in

*every* case. Because Mrs. Masters had supporting evidence that the arrested plaintiff in *Baker* did not possess, the officer was required to investigate and determine the true facts.

The defendants approach the strip search issue differently. They argue that there was no clearly established right for a pretrial detainee in the Jefferson County jail to be free of a strip search before being moved from the holding area to a cell. On the contrary, they maintain, the consent decree in *Tate* v. *Frey* authorized such searches and this court, in *Dobrowolskyj* v. *Jefferson County,* 823 F.2d 955 (6th Cir. 1987), upheld the constitutionality of the search policy. They contend that the Jefferson County policy passes muster under the reasoning of *Bell* v. *Wolfish,* 441 U.S. 520 (1979), which upheld a policy of the New York City Metropolitan Correctional Center that required body-cavity searches of inmates following contact visits with persons from outside the institution.

The plaintiff responds that *Bell* v. *Wolfish* prescribed a balancing of the competing interests of the detainee and the authorities, and held the *particular* search in that case permissible because the need for the search outweighed the plaintiff's right to be free of such intrusion. *Bell* v. *Wolfish* did not give carte blanche approval to a practice of strip searching all pretrial detainees. In applying the limitations imposed by the Supreme Court, the plaintiff contends, no published opinion of any court has upheld the constitutionality of a policy which permits routine strip searches of persons arrested for minor offenses. Thus, she argues, the right of a person in her position to be free of such a search was clearly established, in the "particularized sense" required by *Creighton* v. *Anderson.*

## IV.

We believe the district court erred in concluding that clearly established law required the defendants to investi-

gate sufficiently to determine that the arrest warrant had been mistakenly issued on the basis of an error by a judge. The warrant named the plaintiff, who was the person charged by the Jefferson County police and gave her correct address. The warrant was valid on its face, and Barrows did make a call to verify that it was still outstanding. The "reminder card" did not bear Mrs. Masters' name or any description of a charge, but merely showed that some proceedings would take place in Courtroom No. 102 at 9:00 a.m. on October 23, 1986. While this document certainly strengthened her claim of mistake, it was not sufficient to require further investigation. Since the error was made by the judge who set the date, not by the person who issued the warrant, it is unlikely that the mistake would have been discovered by any investigation that did not include examining that particular judge's daily records.

Of course, a more sensitive group of public employees might have made the additional investigation, but the Constitution did not require it. *Baker* v. *McCollan* is the controlling case. There a man was arrested and held for several days under a warrant that was valid on its face. The warrant was intended for McCollan's brother, however, and McCollan was released when the mistake was discovered. The brother had given the police McCollan's driver's license when arrested. The Supreme Court found that McCollan's claim was based on the alleged intentional failure of the authorities to investigate his claim of innocence after he was incarcerated. The decision states a rule, however, with respect to the duty to investigate that applies to an arresting officer as well as to custodians following arrest. The Court pointed out that the Constitution does not guarantee that only the guilty will be arrested; police and correction employees may rely on facially vaild arrest warrants even in the face of vehement claims of innocence by reason of mistaken identity or otherwise. 443 U.S. at 145.

The district court found an implication in the Supreme Court's statement that an arresting officer is not required to conduct an independent investigation into every claim of innocence, that in exceptional cases such as this one the Constitution does require such an investigation. While the language clearly supports an inplication that there may be cases where such an investigation is required, it is not a sufficient statement to satisfy the requirement that the right relied upon must be "clearly established." We have found no case from the Supreme Court or this court holding an arresting officer with a valid warrant, or a custodian, liable in a § 1983 action for arresting and detaining the wrong person for a brief time due to a mistake in identity. In *Coogan* v. *City of Wixom*, 820 F.2d 170 (6th Cir. 1987), we cited *Baker* v. *McCollan* in holding that a person arrested pursuant to a valid warrant had "no legal basis" for a claim of a constitutional violation. *Id.* at 174.

We vacate the order denying the defendants' motion to dismiss the claim related to the plaintiff's arrest and detention pursuant to the facially vaild warrant. This claim will be dismissed upon remand.

V.

A.

The strip search in this case consisted of two discrete acts. First, Mrs. Masters was required to expose her breast area, and later she was required to remove all her cloths and undergo the further visual inspection previously described. We consider the two incidents a single search, although either would be treated as a strip search if it occurred alone.

We have found no authority approving a practice of conducting a strip search of a person arrested for a simple traffic violation in the absence of at least reasonable suspicion that the person might be carrying a weapon, illegal drugs, or other contraband. As the defendants have noted,

the Supreme Court approved a policy of conducting strip searches of pretrial detainees under certain circumstances in *Bell* v. *Wolfish*, 441 U.S. 520 (1979). These searches were conducted following every contact visit by a detainee with a person from outside the institution. There is an obvious risk that such a visit may be used to introduce contraband into a penal institution. While the Court emphasized the wide-ranging deference to be accorded the decisions of correction officials with respect to institutional security, it clearly prescribes a test of reasonableness based upon a balancing of competing interests:

> The test of reasonableness under the Fourth Amendment is not capable of precise definition or mechanical application. In each case it requires a balancing of the need for the particular search against the invasion of personal rights that the search entails. Courts must consider the scope of the particular intrusion, the manner in which it is conducted, the justification for initiating it, and the place in which it is conducted.

*Id.* at 559.

As the court stated in *Mary Beth G.* v. *City of Chicago*, 723 F.2d 1263, 1272 (7th Cir. 1983), *Bell* v. *Wolfish* does not validate a blanket policy of strip searching pretrial detainees. *Bell* v. *Wolfish* authorizes particularized searches where objective circumstances indicate such searches are needed to maintain institutional security. The *Mary Beth G.* court found that no such need existed for strip searches, including visual inspection of the breast area and body cavities, of female detainees arrested for traffic offenses and other nonviolent misdemeanors. The city's inability to gather evidence proving that female minor offenders in general were security risks demonstrated that the only justification for the policy was institutional convenience—a policy of strip searching all female detainees is easier to administer than one which requires a balancing of interests in each

case and an individual determination of need. *Id.* at 1272-73.

In *Mary Beth G.* the court followed its earlier affirmance of a district court decision. See *Tinetti* v. *Wittke,* 479 F. Supp. 486 (E.D. Wis. 1979), *aff'd,* 620 F. 2d 160 (7th Cir. 1980). In *Tinetti* a woman arrested for speeding was subjected to a visual body cavity search pursuant to a policy that all persons detained in a county jail be subjected to a strip search, regardless of their offense. The district court held that strip searches must be justified by a reasonable belief that they will reveal weapons or instruments of escape or evidence that could be concealed or destroyed. Unlike detainees charged with criminal offenses, the court found there is little reason to believe that persons arrested for traffic violations will conceal weapons or contraband. The policy was unconstitutional because it failed to require any balancing of interests. The court of appeals adopted the district court's opinion.

The defendants seek to justify the strip search with the fact that Mrs. Masters was being moved from the holding area to a cell on a different floor of the justice center. Several cases have recognized imminent mingling with other inmates as a consideration in the decision whether to strip search a detainee. However, the fact of intermingling alone has never been found to justify such a search without consideration of the nature of the offense and the question of whether there is any reasonable basis for concern that the particular detainee will attempt to introduce weapons or other contraband into the institution.

In *Logan* v. *Shealy* 660 F.2d 1007 (4th Cir. 1981), *cert. denied sub nom. Clements* v. *Logan,* 455 U.S. 942 (1982), the plaintiff was arrested for driving while intoxicated and ordered to be held for four hours or until released to a responsible person. She was taken to a holding area and subjected to a visual strip search. In reversing a directed verdict for the defendants the court of appeals found that

the search was unrelated to any discernible security needs and could not reasonably be thought justified when balanced against the nature of the instrusion. The court listed four factors that led to its conclusion: (1) the plaintiff would not be intermingled with the general jail population; (2) the offense, although not a minor traffic violation, was not one usually associated with the possession of weapons or contraband; (3) there was no cause to believe that this particular detainee might possess either; and (4) when the search was conducted the plaintiff had been at the detention center for one and one-half hours without even a pat down.

The facts in *Hill* v. *Bogans,* 735 F. 2d 391 (10th Cir. 1984), are similar in many respects to those in the present case. The plaintiff paid a fine for a traffic violation. When he was stopped later for having an expired inspection sticker the arresting officer was told by police headquarters that there was an outstanding bench warrant for the plaintiff's arrest. In fact, the warrant had been withdrawn by the court. After being fingerprinted and patted down the plaintiff was subjected to a visual strip search before being transferred "upstairs" to a prison area. The search was conducted in an area where 10 or 12 people were milling about. The court of appeals held the search unconstitutional upon balancing the interests of the parties, tracking the reasoning of *Logan* and *Tinetti.* It found that the plaintiff's intermingling with the general prison population was the only "conceivable justification" for the strip search. The court stated that "intermingling is only one factor to consider in judging the constitutionality of a strip search." *Id.* at 394. Opposing this single factor were other factors that led the court to find that no circumstances indicated that the plaintiff might possess either a weapon or drugs.

*Giles* v. *Ackerman,* 746 F. 2d 614 (9th Cir. 1984), *cert. denied,* 411 U.S. 1053 (1985), applied the prescribed balancing test and held unconstitutional a policy requiring all

persons booked into a county jail to be strip searched. In doing so the court declared that "arrestees for minor offenses may be subjected to a strip search only if jail officials have a reasonable suspicion that the particular arrestee is carrying or concealing contraband or suffering from a communicable disease." *Id.* at 615. The court discounted the defendants' reliance on the fact that temporary detainees were intermingled with the general jail population as justification for the search. It found that "such intermingling is both limited and avoidable." *Id.* at 619.

B.

No decision of this court has specifically balanced the rights of arrestees for minor offenses against a practice of conducting strip searches. However, in upholding a visual body cavity search in *Dufrin* v. *Spreen,* 712 F. 2d 1084 (6th Cir. 1983), we followed *Bell* v. *Wolfish* by balancing the competing interests. Factors supporting the search were that the plaintiff was arrested for felonious assault, a felony and "class of crime of which violence is an element," and that because of jail conditions the plaintiff "would ultimately come into contact with the general jail population." *Id.* at 1087. The *Dufrin* court carefully distinguished *Tinetti* and *Logan* and other cases cited by the plaintiff on the ground that "they have invariably involved misdemeanors, traffic offenses, or similar minor offenses not normally associated with weapons or contraband." *Id.* at 1088. Thus, we indicated that a combination of circumstances justified the search. Considering *Dufrin* along with decisions from other circuits such as *Hill* v. *Bogans* and *Giles* v. *Ackerman,* it was clearly established in October 1986 that authorities may not strip search persons arrested for traffic violations and nonviolent minor offenses solely because such persons ultimately will intermingle with the general population at a jail when there were no circumstances to support a reasonable belief that the detainee will carry weapons or other

contraband into the jail. It is objectively reasonable to conduct a strip search of one charged with a crime of violence before that person comes into contact with other inmates. There is an obvious threat to institutional security. However, normally no such threat exists when the detainee is charged with a traffic violation or other nonviolent minor offense.

The decisions of all the federal courts of appeals that have considered the issue reached the same conclusion: a strip search of a person arrested for a traffic violation or other minor offense not normally associated with violence and concerning whom there is no individualized reasonable suspicion that the arrestee is carrying or concealing a weapon or other contraband, is unreasonable. We believe the right of such a person to be free of such a search was "clearly established" on October 21, 1986. The single fact that Mrs. Masters, for some reason, would come into contact with other prisoners was not sufficient justification for the search in this case. It did not outweigh the other factors negating any claim that such a search was reasonable in this case.

C.

The defendants cite the consent decree in *Tate* v. *Frey* and argue that Mrs. Masters is precluded by that decree from challenging the strip search policy as it was applied to her. Federal courts move very cautiously when asked to give preclusive effect to consent decrees. As stated by Professor Moore, consent judgments "should not be given conclusive effect under the doctrine of collateral estoppel, although they are res judicata as to the causes of action adjudged; and may in some instances, by virtue of the parties' intent, be given conclusive effect as to the issues involved." 1B J. Moore, J. Lucas & T. Currier, Moore's Federal Practice ¶ 0.443[3] at 768 (2d ed. 1988). See *Kaspar Wire Works, Inc.* v. *Leco Engineering & Machine, Inc.*, 575

F. 2d 530, 539 (5th Cir. 1978) ("Whatever type of repose is sought to be invoked as a result of a judicial consent decree, a court should take into account the fact that it was rendered by consent and determine its impact by the issues actually intended to be precluded by the parties.").

The defendants' reliance on the consent decree in *Tate* v. *Frey* is misplaced. The consent decree dealt with numerous issues related to conditions in the Jefferson County jail, largely resulting from overcrowding. With respect to searches the decree merely provides that the defendants will establish policies "addressing the search of inmates and inmate's property." The "guidelines" in the consent decree provide for strip searches of all inmates "entering or leaving the security perimeter," all inmates coming into direct contact with a visitor and all other inmates "upon reasonable belief that the inmate may be in possession of contraband." The policy relied upon by the defendants for Mrs. Masters' strip search provides that newly admitted inmates will be strip searched immediately prior to the movement of the inmate to the "rear security, female section."

To hold that the consent decree prevents Mrs. Masters from relying on the clearly established law relating to strip searches of traffic violators and other nonviolent minor offenders would be to accord the decree an unwarranted preclusive effect. There is no showing in the record before us that any party in *Tate* v. *Frey* was being detained in the Jefferson County jail for a traffic violation or similar nonviolent offense. Nor is there any showing that the issue of the constitutionality of strip searches of such inmates was litigated in *Tate* v. *Frey*. In *Balbirer* v. *Austin*, 790 F. 2d. 1524, 1528 (11th Cir. 1986), the court stated that "a consent judgment cannot constitute collateral estoppel unless the party pleading collateral estoppel proves from the record of the prior case or through extrinsic evidence that the parties intended the consent judgment to operate as a final adjudication of a particular issue." In holding that

a consent decree has a preclusive effect only to the extent that it constitutes an agreed adjudication of an issue on the merits, the *Balbirer* court cited *Spilman* v. *Harvey*, 656 F. 2d 224 (6th Cir. 1981), along with cases from the Supreme Court and other circuits. The record in this case provides no basis for the defendants' claim that Mrs. Masters is precluded from challenging the strip search.

The defendants seek to support their claim of preclusion by relying on *Dobrowolskyj* v. *Jefferson County*, 823 F. 2d 955 (6th Cir. 1987). In *Dobrowolskyj*, we held that the strip search policy was constitutional as applied to a Jefferson County jail detainee who had been arrested and charged with "menacing," an offense normally associated with weapons and other contraband. While we cited the consent decree in *Tate* v. *Frey* as an indication of the reasonableness of the search policy, we clearly did not give the decree preclusive effect. Rather, we applied the balancing test of *Bell* v. *Wolfish* and concluded that the *combination of factors*, including the nature of the detainee's offense and the fact that he was about to be moved to a place where he would come into contact with the general jail population justified the search. We certainly did not give the consent decree and strip search policy the interpretation and effect claimed by the defendants here: that the intermingling of Dobrowolskyj, alone, justified the strip search. We carefully distinguished *Tinetti, Logan, Mary Beth G., Hill,* and other decisions concerning strip searches of persons charged with traffic violations and other nonviolent minor offenses. *Id.* at 957. We noted our decision in *Dufrin* and the fact that we had distinguished *Logan* and *Tinetti in Dufrin. Id.* at 957-58. We stated our holding in *Dobrowolskyj* as follows:

> Applying the balancing test from *Bell*, we find that the security interests of the jail outweigh the privacy interests of the inmates *in the circumstances of this case.*

> Thus, Dobrowolskyj's search was not unreasonable and did not violate the fourth amendment.

823 F. 2d at 959 (emphasis added). Nothing in our opinion, last of all the holding, supports the defendants' claim of preclusion.

*Conclusion*

It was clearly established on October 21, 1986, that a pretrial detainee has the right not to be searched unless the reasonableness of such a search is established by "a balancing of the need for the *particular* search against the invasion of personal rights that the search entails." *Bell* v. *Wolfish*, 441 U.S. at 559 (emphasis added). It was equally established that a person charged only with a traffic violation or nonviolent minor offense may not be subjected to a strip search unless there are reasonable grounds for believing that the particular person might be carrying or concealing weapons or other contraband. The strip search of Mrs. Masters as set forth in the complaint failed the standard of "objective reasonableness," *Harlow* v. *Fitzgerald*, 457 U.S. at 818. Thus, the defandants are not entitled to prevail at this stage of the case on their claim of qualified immunity. The district court correctly denied the motion to dismiss insofar as it related to the Fourth Amendment claim based on the strip search.

VI.

The judgment of the district court is affirmed in part and reversed in part, and the case is remanded for further proceedings.

# UNITED STATES DISTRICT COURT

WESTERN DISTRICT OF KENTUCKY
LOUISVILLE DIVISION

**Civil Action No. C87-0450-L(J)**

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KAREN B. MASTERS, - - - - - - - *Plaintiff,*

*v.*

JEFFERSON COUNTY, Et Al., - - - - *Defendants.*

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**MEMORANDUM OPINION**—Entered April 18, 1988

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This matter is before the court on defendants' Motion to Dismiss and Plaintiff's Motion for Partial Summary Judgment. This is a civil rights case arising under 42 U.S.C. 1983. Plaintiff also alleges claims arising under state law. Jurisdiction exists under 28 U.S.C. 1331 and 1343. The court will exercise pendent jurisdiction over the related state law claims.

## I. ALLEGED FACTS

The plaintiff, Karen B. Masters, (Masters) alleges the following facts on which she bases her claim for relief. On July 31, 1986, Masters received two traffic tickets for expired registration plates and failure to maintain insurance for her automobile. On August 21, 1986, she appeared in Jefferson County District Court and pled not guilty to the charges. On September 25, 1986, she appeared before the court and plead not guilty to the charge a second time. Masters was assigned a third court date, October 23, 1986. She was given a reminder card clearly indicating that she was to return to court on this date. However, the presiding Judge mistakenly recorded Masters' third appearance date in the controlling court record as October 16, 1986.

On the afternoon of October 21, 1986, while at her home with her children, Jefferson County Police Officer Joseph Barrows arrested Masters for failure to appear in Court on October 16, 1986. Plaintiff protested her arrest and showed Barrows the reminder card confirming the October 23, 1986, court date. Because of her protest Barrows confirmed the existence of the warrant under which he was acting. No effort was made to confirm the validity of the reminder card upon which plaintiff relied.

Barrows then took Masters via squad car to a public parking lot where she was transferred to the custody of Officer Roger Calhoun. Despite her protest Calhoun restrained Masters by securing her hands behind her back with handcuffs. Through this chain of events Masters repeated her claim that her arrest was a mistake.

Plaintiff was taken to the Hall of Justice and turned over to the Metropolitan Department of Corrections (Corrections). Again she protested that her arrest was a mistake, and showed the reminder card to Officer Teresa Banks to support her claim. Officer Banks then conducted a frisk search of Masters, and placed her in a "holding room" with other women. After a period of time, one of the female defendant Corrections employees entered the room, asked the other women to leave and required plaintiff to open her blouse. The procedure was performed in front of a window in the holding room in plain view of other persons.

Four hours after her arrest, plaintiff was removed from the holding room, handcuffed, and taken to the third floor of the Jefferson County Jail across the street from the Hall of Justice. There, Officer Vicki Wimbs conducted a strip search of plaintiff. Masters was then given prison dress and blankets and placed in the general population area of the jail. Later that evening, she was removed from the cell area, allowed to dress in her own clothes, and released on her own recognizance with instructions to return to the court the next morning. Once in Court the Judge ack-

nowledged the recording error that had caused the warrants to be issued for her arrest.

Plaintiff claims defendants' failure to undertake minimal investigative action as to her claim of mistake constitutes gross negligence, and there was no independent purpose served by or justification for plaintiff's strip search and incarceration. It is further alleged that defendants' conduct deprived Masters of her constitutional rights secured by the fourth, fifth, eight, ninth, and fourteenth amendments without due process of law.

Based on the same factual allegations Masters also claims she is entitled to relief under the following state law causes of action; assault and battery, false imprisonment, intentional infliction of emotion distress, negligence and gross negligence.

## II. MOTION TO DISMISS

Defendants' move the court to dismiss this action pursuant to Fed. R. Civ. P. 12(b)(6) for failure to state a claim upon which relief can be granted and the qualified immunity of the individual defendants.

In considering a motion to dismiss under Fed. R. Civ. P. 12(b)(6) we must examine the sufficiency of the pleadings. All of the allegations of the pleading are to be construed in the light most favorable to the pleader and accepted as true. *Jenkins* v. *McKeithen*, 395 U.S. 411, 89 S. Ct. 1843 (1969); *L'Orange* v. *Medical Protective Co.*, 394 F. 2d 57 (6th Cir. 1968).

The first issue is whether Masters has stated a claim against the defendants for failure to investigate her claims of innocence prior to her arrest and after she was incarcerated. There are two elements which must be present in order to maintain an action under Section 1983. First, the actions of the defendants must have been committed under color of state law. Second, the actions must have

deprived the plaintiff of a right or rights secured by the Constitution or laws of the United States. *Adickes* v. *S. H. Kress & Co.*, 398 U.S. 144 (1970); *Parratt* v. *Taylor*, 451 U.S. 527 (1981). Defendants contend Masters suffered no deprivation of any constitutional right.

In *Baker* v. *McCollan*, 443 U.S. 137, 99 S. Ct. 2689 (1979), the Supreme Court held, "Given the requirements that arrest be made only on probable cause and that one detained be accorded a speedy trial, we do not think a sheriff executing an arrest warrant is required by the Constitution to investigate independently every claim of innocence, . . ." The facts in *Baker* involved a case of mistaken identity. McCollan's brother obtained a duplicate of his driver's license except the picture on the license had been changed to that of the brother. The brother was arrested on narcotics charges and booked in McCollan's name based on the altered license. Later an arrest warrant was issued in McCollan's name. When McCollan was stopped for running a red light, a routine check by the police officer revealed the warrant. Over McCollan's protest he was arrested and incarcerated until the mistake was revealed.

Here defendants contend the holding in *Baker* relieves the police and correctional officers of any duty to investigate the claims of innocence. *Baker* plainly states that there is no duty to investigate in every case. Therefore, by implication the Court has stated in some cases a duty to investigate an arrestee's claim of innocence may arise. The facts surrounding Masters' arrest and of the one in *Baker* are distinguishable. Masters had documentary evidence which, although not conclusive, strongly supported her claim of innocence. No such documentation was offered by McCollan in *Baker*. Therefore, Masters has stated a claim against the police and correctional officers which may arise to a deprivation of constitutional rights.

Defendants contend Masters' claim that it was unconstitutional to strip search her must be dismissed for failure

to state a claim. Upon Masters being processed into the corrections facility she was properly classified as a "female pretrial detainee", therefore, she was a class member bound by the Consent Decree entered in *Tate* v. *Frey, et al.*, U.S. District Court for the Western District of Kentucky at Louisville, No. 75-00031-L(A). Defendants' policy regarding the movement and search of those over which it exercises custody was determined to meet constitutional standards by a division of this court upon approval of the Consent Decree. The relevant part of the policy states:

> All inmates will be thoroughly searched each time an inmate passes from one security area to another, being prepared for transportation both between floors and externally, and upon admission to the Department. All newly admitted inmates to the Department will be frisked searched upon arrival to the Department and strip searched immediately prior to the movement of the inmate to rear security, female section or other areas of the Department.

In *Dobrowolskyj* v. *Jefferson County, Ky.*, 823 F. 2d 955 (6th Cir. 1987), the Sixth Circuit Court of Appeals held the strip search of a pre-trial detainee pursuant to the Consent Decree in *Tate* v. *Frey, supra*, was constitutional. There, as in this case, a pre-trial detainee was being held in the holding area of the jail, but due to over crowded conditions jail officials transferred him to the general population area of the jail. The Court applied the balancing test established in *Bell* v. *Wolfish*, 441 U.S. 520, 99 S. Ct. 1861 (1979), which upheld the constitutionality of a search policy. The Court in *Bell, supra*, held;

> The fourth amendment requires a balancing of the need for the particular search against the invasion of personal rights that the search entails. Courts must consider the scope of the intrusion, the manner in which

it is conducted, the justification for initiating it, and the place in which it is conducted.

*Id.* at 559, 99 S. Ct. at 1184.

Applying the balancing test in *Dobrowolskyj, supra,* the Court considered the nature of the offense of the arrestee and need to maintain security within the facility. There, the arrestee was being held on a charge of menacing, a misdemeanor associated with the infliction of physical injury on another, therefore, the Court found that the correction officials' interest in maintaining security outweighed the privacy interest of the arrestee. The Court distinguished its holding from those cases which held strip search policies unconstitutional because they included persons detained on minor traffic offenses and other misdemeanors not formally associated with weapons or other contraband. In other words, there was adequate justification for initiating the search.

Although the corrections officials have a strong and valid interest in maintaining security, this case differs from *Dobrowolskyj, supra,* because Masters was detained on a minor traffic offense. Therefore, plaintiff's complaint raises an issue as to whether certain constitutional rights were infringed upon by subjecting a detainee to a strip search without consideration for the nature of the charge.

The next issue is whether the individual defendants are entitled to the defense of qualified immunity. In *Harlow v. Fitzgerald,* 457 U.S. 800, 102 S. Ct. 2727 (1982), the Supreme Court established when government officials may rely on the doctrine of qualified immunity to insulate themselves from civil liability. The Court held, ". . . government officials performing discretionary functions generally are shielded from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." 457 U.S. at 819, 102 S. Ct at 2738. "If the

law was clearly established, the immunity defense ordinarily should fail, since a reasonably competent official should know the law governing his conduct." *Id.*

In a recent holding, *Anderson* v. *Creighton,* 483 U.S. —, 107 S. Ct. —, 97 L. Ed. 2d 523 (1987), the Supreme Court issued guidelines as to what constitutes clearly established laws in terms of qualified immunity. The facts in *Anderson, supra,* involved an F.B.I. agent who conducted a forcible, warrantless search of a home in the mistaken belief that a bank robbery suspect might be found there. The homeowners filed suit claiming the agent violated their rights under the Fourth Amendment. The Court held qualified immunity defense isolated the agent from civil liability under the applicable facts.

Underlying the qualified immunity defense are two conflicting policy considerations. First, an action for damages may offer the only realistic avenue for vindication of constitutional guarantees when governmental officials abuse their offices. On the other hand, such actions can entail substantial social costs, including the risk that fear of personal liability will inhibit officials from the discharge of their duties. *Anderson,* 97 L. Ed. 2d at 529. The purpose of qualified immunity is for government officials to reasonably anticipate when their conduct may give rise to liability for damages. Therefore, the right allegedly violated by the official must be clearly established. It is insufficient for plaintiff to avoid the defense by merely pleading an official's action violated a right guaranteed by the Constitution. "The contours of the right must be sufficiently clear that a reasonable official would understand that what he is doing violates that right." *Anderson,* 97 L. Ed. 2d at 531.

The *Anderson* Court resolved the issue by answering the following question. "Whether a reasonable officer could have believed Anderson's warrantless search to be lawful, in light of clearly established law and the information the searching officers possessed. Anderson's subjective beliefs

about the search are irrelevant." *Anderson,* 97 L. Ed. 2d at 532. Applying the test to this case we must first consider the individual police and corrections officers could have believed Masters' arrest and incarceration to be lawful, in light of *Baker* v. *McCollan,*-443 U.S. 137 (1979), and the information (the card verifying her court date) the officers possessed. In *Baker, supra,* by implication the Court has stated in some cases a duty to investigate an arrestee's claim of innocence may arise. The fact Masters repeatedly showed the defendants documentation of her innocence should have made a reasonable officer aware that some investigation into the plaintiffs claims of innocence was warranted. The qualified immunity defense is not available to the individual police and corrections officers as it relates to the claims for failure to investigate.

We must also consider whether the individual corrections officers could have believed subjecting Masters' to a strip search was lawful, in light of *Dobrowolskyj* v. *Jefferson County, Ky.,* 823 F. 2d 955 (6th Cir. 1987), and the information the officers possessed. The holding in *Dobrowolskyj, supra,* makes clear that officers should consider the nature of the offense allegedly committed by the detainee prior to subjecting them to a strip search. Furthermore, the corrections officers are charged with knowing on what charge a detainee is being held. In light of *Dobrowolskyj, supra,* and the fact that Masters was charged with a minor traffic offense, the qualified immunity defense is not available to claim that her strip search was unconstitutional.

The final issue is whether Masters has stated a claim against Jefferson County and its agencies, the Jefferson County Police Department and the Metropolitan Department of Corrections. Governmental entities can only be liable for policies, customs, or procedures which deprive persons of their constitutional rights and governmental defendants may not be held liable under any theory of re-

spondeat superior. *Monell* v. *New York Department of Social Services,* 436 U.S. 658, 98 S. Ct. 2018 (1978). Plaintiff's Amended Complaint has stated a claim against the defendant Jefferson County and its agencies, the Jefferson County Police Department and the Metropolitan Department of Corrections.

## III. MOTION FOR PARTIAL SUMMARY JUDGMENT

The plaintiff moves the court to enter a partial summary judgment declaring the internal strip search policy of the Metropolitan Department of Corrections unconstitutional. The Motion is premature as there are disputed issues of material fact. The Motion for Partial Summary Judgment is denied.

## IV. CONCLUSION

In accordance with reasons stated above the defendants' Motion to Dismiss is denied. The plaintiff's Motion for Partial Summary Judgment is also denied.

An appropriate Order shall accompany this Memorandum Opinion.

Dated 4-14-88

(s) Edward H. Johnstone
Edward H. Johnstone, Chief Judge
United States District Court

# UNITED STATES DISTRICT COURT

WESTERN DISTRICT OF KENTUCKY
LOUISVILLE DIVISION

**Civil Action No. C87-0450-L(J)**

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KAREN B. MASTERS, - - - - - - - *Plaintiff,*

*v.*

JEFFERSON COUNTY, Et Al., - - - - - - *Defendants.*

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**ORDER**—Entered April 18, 1988

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For the reasons stated in the Memorandum Opinion this date entered, IT IS ORDERED;

1. Defendants Motion to Dismiss is DENIED.

2. Plaintiff's Motion for Partial Summary Judgment is DENIED.

Dated 4-14-88

(s) Edward H. Johnstone
Edward H. Johnstone, Chief Judge
United States District Court

# UNITED STATES COURT OF APPEALS

**FOR THE SIXTH CIRCUIT**

**No. 88-5477**

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KAREN B. MASTERS, - - - - *Plaintiff-Appellee,*

*v.*

BOBBY G. CROUCH, et al., - - *Defendants-Appellants.*

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**JUDGMENT**—Filed April 18, 1989

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Before: MERRITT and MILBURN, Circuit Judges; and LIVELY, Senior Circuit Judge.

ON APPEAL from the United States District Court for the Western District of Kentucky.

THIS CAUSE came on to be heard on the record from the said district court and was argued by counsel.

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this court that the judgment of the said district court in this case be and the same is hereby affirmed in part and reversed in part, and the case is remanded for further proceedings.

Each party is to bear its own costs on appeal.

Entered by Order of the Court

Leonard Green, Clerk
(s) Leonard Green
Clerk

No. 88-5477

# UNITED STATES COURT OF APPEALS

## FOR THE SIXTH CIRCUIT

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KAREN MASTERS, - - - - - *Plaintiff-Appellee,*

*v.*

JEFFERSON COUNTY, et al., - - - - *Defendants,*
BOBBY CROUCH, et al., - - *Defendants-Appellants.*

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**ORDER**—Filed July 14, 1989

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BEFORE: MERRITT and MILBURN, Circuit Judges; and LIVELY, Senior Circuit Judge

The Court having received a petition for rehearing en banc, and the petition having been circulated not only to the original panel members but also to all other active judges of this Court, and no judge of this Court having requested a vote on the suggestion for rehearing en banc, the petition for rehearing has been referred to the original hearing panel.

The panel has further reviewed the petition for rehearing and concludes that the issues raised in the petition were fully considered upon the original submission and decision of the case. Accordingly, the petition is denied.

Entered by Order of the Court

(s) Leonard Green
Leonard Green, Clerk

# UNITED STATES DISTRICT COURT

**FOR THE WESTERN DISTRICT OF KENTUCKY AT LOUISVILLE**

**Civil Action No. 87-0450-L-J**

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KAREN B. MASTERS
5002 Axtell Avenue
Louisville, Kentucky 40258, - - - - *Plaintiff*

*v.*

JEFFERSON COUNTY

Serve: County Attorney Mike Conliffe
527 W. Jefferson Street
Louisville, Kentucky 40202

JEFFERSON COUNTY POLICE DEPARTMENT

Serve: Chief Bobby G. Crouch
600 W. Jefferson Street
Louisville, Kentucky 40202

BOBBY G. CROUCH, in his official capacity as Chief of the Jefferson County Police Department, 600 W. Jefferson Street, Louisville, Kentucky 40202

JOSEPH BARROWS and ROGER CALHOUN, individually and in their official capacities as officers of the Jefferson County Police Department, 600 W. Jefferson Street, Louisville, Kentucky 40202

METROPOLITAN DEPARTMENT OF CORRECTIONS

Serve: Chief Richard A. Frey, Jr.
600 W. Jefferson Street
Louisville, Kentucky 40202

RICHARD A. FREY, JR., in his official capacity as Chief of the Metropolitan Department of Corrections, 600 W. Jefferson Street, Louisville, Kentucky 40202

SGT. WILLIAM P. ROSE, JR., and OFFICERS TERESA BANKS, LARRY NAJJAR and VICKI WIMBS, individually and in their official capacities as officers and employees of the Metropolitan Department of Corrections, 600 West Jefferson Street, Louisville, Kentucky 40202 - - - - - - - - *Defendants*

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**FIRST AMENDED COMPLAINT**—October 23, 1986

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I. *Introduction*

1. Karen B. Masters, Plaintiff, files this action complaining of the egregious and unjustifiable conduct of the Defendants named in the caption above. As more specifically set forth below, Plaintiff, a law-abiding citizen with no prior offense record or history of misconduct, received tickets for two minor traffic offenses and then, after a mere recording error in Jefferson District Court, was unlawfully and unjustifiably arrested, strip-searched and imprisoned by Defendants. It is the purpose of this action to recover the actual damages Plaintiff sustained as a result of Defendants' conduct, as well as any punitive damages to which she is entitled, and to insure that no citizen of Jefferson County is ever again victimized by the blatant, malicious and repeated violations of constitutional and common law rights that were endured by Plaintiff.

II. *Jurisdiction and Venue*

2. Plaintiff seeks damages from Defendants under the Civil Rights Act of 1871, 42 U.S.C. § 1983, for gross and unconscionable violations of the rights, privileges and immunities guaranteed her by the Fourth, Fifth, Eighth, Ninth and Fourteenth Amendments to the Constitution of the United States. Accordingly, this Court has jurisdiction of this case pursuant to the provisions of 28 U.S.C.

§ 1331 and 1343. Plaintiff also seeks declaratory and injunctive relief, as well as damages under the pendent jurisdiction of this Court for false arrest, false imprisonment, negligence, gross negligence, intentional infliction of emotional distress, and assault and battery. As Louisville, Kentucky is the residence of all parties to this action and the location of all acts pertinent to this suit, venue is proper in this Court.

III. *Parties*

3. Plaintiff is a resident of Louisville, Jefferson County, Kentucky.

4. Defendant Jefferson County, at all times mentioned herein, employed, was responsible for the establishment of policies either formally or by custom for, and was responsible for the employment, training, supervision and conduct of, the officers and employees of the Jefferson County Police Department and the Metropolitan Department of Corrections.

5. Defendant Jefferson County Police Department, at all times mentioned herein, employed, was responsible for the establishment of policies either formally or by custom for, and was responsible for the employment, training, supervision and conduct of, the officers and employees of the Jefferson County Police Department.

6. Defendant Bobby G. Crouch is and was, at all times mentioned herein, Chief of the Jefferson County Police Department, and as such established policies either formally or by custom for, and was responsible for the employment, training, supervision and conduct of, the officers and employees of the Jefferson County Police Department.

7. Defendants Joseph Barrows and Roger Calhoun are and were, at all times mentioned herein, officers of the Jefferson County Police Department.

8. Defendant Metropolitan Department of Corrections, at all times mentioned herein, employed, was responsible for the establishment of policies either formally or by cus-

tom for, and was responsible for the employment, training, supervision and conduct of, the officers and employees of the Metropolitan Department of Corrections.

9. Defendant Richard A. Frey, Jr. is and was, at all times mentioned herein, Chief of the Metropolitan Department of Corrections, and as such established policies either formally or by custom for, and was responsible for the employment, training, supervision and conduct of, the officers and employees of the Metropolitan Department of Corrections.

10. Defendants Sgt. William P. Rose, Jr., and Officers Teresa Banks, Larry Najjar and Vicki Wimbs, are and were, at all times mentioned herein, officers and employees of the Metropolitan Department of Corrections. In addition, Sgt. Rose and Officer Najjar were supervisors on duty during Plaintiff's incarceration and search, and as such, were responsible for the supervision and conduct of Officers Bank and Wimbs.

## IV. *Nature of Defendants' Conduct*

11. Defendants, individually and in conspiracy with one another, engaged in the conduct described below under color of the law of the Commonwealth of Kentucky and Jefferson County. The individual defendants named above participated or knowingly acquiesced in, contributed to, encouraged, implicitly authorized or approved of the conduct described below individually and in their official capacities with the state or county agency by whom they were employed. The events described below resulted from the failure of the state and county agencies and the supervisory officials named above to employ qualified persons for positions of authority, and/or to properly or conscientiously train and supervise the conduct of such persons after their employment, and/or to promulgate appropriate operating policies and procedures either formally or by custom to protect the constitutional rights of the citizens of Jefferson

County, including Plaintiff. Defendants' conduct was intentional or grossly negligent, indicated active malice toward Plaintiff or a total and reckless disregard for and indifference to her constitutional and common law rights, and justifies an award of punitive damages in addition to the actual damages which Plaintiff is entitled to recover.

## V. *Facts*

12. On July 31, 1986, Plaintiff received two traffic tickets for expired registration plates and for failing to maintain insurance on her automobile. Her citation directed her to appear before the Jefferson District Court at the Southwest Government Center at 7219 Dixie Highway, Louisville, Kentucky, on August 21, 1986 at 7:00 p.m.

13. On August 21, 1986, Plaintiff appeared in Jefferson District Court at the Southwest Government Center at the appointed time, and pled not guilty to the traffic violations described in the citation. A second court date was set for September 25, 1986, at which time Plaintiff again appeared and pled not guilty. Plaintiff was then told to appear before the Jefferson District Court, Division 102, on October 23, 1986, and she was given a reminder card by the Deputy Sheriff in attendance confirming the date (See Exhibit A). However, the presiding Judge recorded Plaintiff's third appearance date in the controlling court records as October 16. Plaintiff was not aware, and had no reason to expect, that her third appearance date was actually set for October 16, not October 23. Instead, Plaintiff reasonably relied upon the representations of District Court personnel — as well as the reminder card she had received — and planned to report to Jefferson District Court, Division 102, on October 23.

14. On the afternoon of October 21, 1986, Plaintiff was home alone with her children — Allison (6 years) and Scott (8 years) — and one of their friends. At approximately 3:00 p.m., Officer Joseph Barrows of the Jefferson County

Police Department appeared at Plaintiff's door and placed her under arrest for her alleged failure to make an October 16 court appearance. Plaintiff immediately protested her arrest and presented to Officer Barrows the card she had received at her second appearance, which instructed her to appear for her next and only court date on October 23. In response, Officer Barrow only confirmed with unknown persons the existence of the warrants pursuant to which Plaintiff had been placed under arrest. Plaintiff then requested an opportunity to contact her attorney, which was summarily denied by Officer Barrows. Because there was no one else at her home to care of her children, Plaintiff and her children were taken to the home of Plaintiff's mother in Officer Barrows' squad car where Plaintiff left her children. Plaintiff was then taken by Officer Barrows to the public parking lot of a K-Mart on Dixie Highway where she was transferred to the custody of Officer Roger Calhoun and placed in another squad car. However, before being placed in the squad car, Officer Calhoun placed Plaintiff's hands behind her back and handcuffed her in public. Despite Plaintiff's protests, the handcuffs were applied by Officer Calhoun with such force that Plaintiff's hands became numb and welts appeared after the handcuffs were later removed. Throughout these events, Plaintiff repeatedly advised the officers that her arrest was a mistake and showed them her court date reminder card (which proved the truth of her statements), to no avail. Plaintiff was then taken by Officer Calhoun directly to the Metropolitan Department of Corrections in the Hall of Justice, despite the fact that: (a) the warrants for Plaintiff's arrest specified that Plaintiff was to be arrested and taken to Jefferson District Court; (b) the Jefferson District Courts are also located in the Hall of Justice and were or should have been in session at the time of Plaintiff's arrival at the Metropolitan Department of Corrections; and (c) Plaintiff continued to protest that her arrest was a mistake.

15. After Plaintiff arrived at the Hall of Justice, she was turned over to the Defendant Metropolitan Department of Corrections, in whose custody she would remain until her release. Again Plaintiff protested that her arrest was a mistake, and specifically showed to Officer Teresa Banks the card that proved that her statements were true. Again, Plaintiff was ignored. Plaintiff was required to remove her shoes and empty her pockets. She was then required to "spread eagle" against a wall where, in view of other persons, she was frisked by Officer Banks. Plaintiff was then placed in a "holding room" with several other women. After a period of time, one of the Defendant female Corrections employees entered the room, asked the other women to leave and required Plaintiff to open her blouse. This procedure was performed in front of a window in the holding room in plain view of other persons. Plaintiff was then fingerprinted and photographed, after which she was returned to the holding room.

16. At approximately 7:30 p.m., over four hours after her ordeal had begun, Plaintiff and another woman were handcuffed together and taken to the third floor of the Jefferson County jail across the street from the Hall of Justice. There, Plaintiff was placed in the custody of Officer Vicki Wimbs who took her through an office into an adjoining room, and closed the door. At that point, Plaintiff was subjected, without explanation or justification, to the humiliation and embarrassment of a strip-search: she was ordered by Officer Wimbs to remove all of her clothing except her underpants and to turn around, drop her underpants, bend over and expose her rectum. After her strip-search, Plaintiff was given prison dress and blankets and taken to a jail cell in which she was incarcerated with persons who were held under suspicion of committing offenses far graver than her own.

17. Sometime later than evening, Plaintiff was taken from her jail cell back to a dressing room where she was

permitted to dress in her own clothes, was returned her personal belongings and, without explanation, was released on her own recognizance with instructions that she report to court at 9:00 a.m. the next morning.

18. When Plaintiff appeared in court the next morning, the presiding Judge acknowledged the recording error that had led to the issuance of the warrants for her arrest. The Judge set a new court date of November 12, 1986, at which time Plaintiff appeared before the Court and her traffic tickets were resolved.

## VI. *Causes of Action*

### a. *Count 1*

19. Paragraphs 1-19 above are incorporated herein by reference and made this paragraph 20.

20. Under the facts and circumstances described above, Plaintiff's arrest, strip-search and incarceration with Jefferson County's general jail population were unconscionable. First, Plaintiff should never have been arrested. She repeatedly protested to Defendants that her arrest was a mistake and, most importantly, provided Defendants with documentary evidence (her court date reminder card) that proved her claims. For the same reason, Plaintiff should never have had to endure the terrifying and degrading experience of a strip-search and incarceration with those elements of society that compose the general population of the Jefferson County jail. Under these circumstances, the failure of Defendants to undertake the minimal action required to investigate Plaintiff's claims of mistake shocks the conscious and, in the very least, constitutes gross negligence. Moreover, there was no independent purpose served by or justification for Plaintiff's strip-search and incarceration. The minor nature of Plaintiff's traffic offenses, the controversy surrounding her arrest, and her clean record deprived Defendants of any cause or reason to believe that

any contraband, dangerous materials, incriminating objects or weapons were or would be hidden on Plaintiff's person or in her clothing, or that Plaintiff presented any threat to society at large. Her strip-search and incarceration were therefore wholly unjustified and inexcusable. Defendants' conduct throughout Plaintiff's ordeal was intentional, wanton and malicious, and was indicative of their total and reckless disregard of and indifference to Plaintiff's rights and the risk of harm to Plaintiff and others occasioned by such conduct.

21. Plaintiff believes and, after reasonable discovery, would show that her treatment, described above, was part of a pattern of past misconduct and was the result of statutes, ordinances, regulations, policies, procedures, customs and usages of the Commonwealth of Kentucky and Jefferson County, either written or unwritten, that are systematically applied whenever a person fails to appear before Jefferson District Court for whatever reason, however innocent. Such practices constitute an arbitrary use of government power, and evince a total, intentional and unreasonable disregard for the constitutional and common law rights of the citizens of Jefferson County, including Plaintiff, and the wholesale violations of those rights likely to result from the systematic pursuit of such practices.

22. As a result of the foregoing, Plaintiff, through Defendants' intentional or grossly negligent conduct, was deprived without due process of law of the following rights, privileges and immunities guaranteed to her by the Constitution of the United States in violation of the Civil Rights Act of 1871, 42 U.S.C. §1983:

a) Her right to be secure in her person against unreasonable searches and seizures under the fourth and fourteenth amendments;

b) Her right to privacy in her person against unreasonable intrusions under the fourth, fifth, ninth and fourteenth amendments;

c) Her right not to be deprived of life, liberty or property without due process of law as well as her right to equal protection of the laws secured by the fourteenth amendment; and

d) Her right not to be subjected to cruel and unusual punishment under the eighth and fourteenth amendments.

b. *Count 2*

23. Paragraphs 1-23 above are incorporated herein by reference and made this paragraph 24.

24. By virtue of the foregoing, Defendants assaulted and battered Plaintiff.

c. *Count 3*

25. Paragraphs 1-25 above are incorporated herein by reference and made this paragraph 26.

26. By virtue of the foregoing, Defendants falsely arrested and falsely imprisoned Plaintiff.

d. *Count 4*

27. Paragraphs 1-27 above are incorporated herein by reference and made this paragraph 28.

28. By virtue of the foregoing, Defendants intentionally and unjustifiably inflicted upon Plaintiff severe mental and emotional distress.

e. *Count 5*

29. Paragraphs 1-29 above are incorporated herein by reference and made this paragraph 30.

30. By virtue of the foregoing, Defendants were negligent and grossly negligent, all to the damage of Plaintiff.

VII. *Damages*

31. Paragraphs 1-31 above are incorporated herein by reference and made this paragraph 32.

32. Plaintiff was unjustifiably and unconstitutionally arrested in front of her children and neighbors, handcuffed in public, treated like a common criminal, frisked, strip-searched, and incarcerated with Jefferson County's general jail population, all of which generated tremendous and overwhelming embarrassment, humiliation, and mental and emotional distress. As a result, Plaintiff has suffered, and is entitled to recover, actual damages in an amount in excess of the sum of $200,000.00. Furthermore, Defendants' violations of Plaintiff's constitutional and common law rights were cruel, malicious, and evinced a total and reckless disregard for those rights, entitling Plaintiff to recover punitive damages in an amount not less than three (3) times the actual damages she is found to have sustained.

VIII. *Declaratory Judgment and Permanent Injunction*

33. Paragraphs 1-33 above are incorporated herein by reference and made this paragraph 34.

34. In addition to the foregoing, Plaintiff requests that this Court issue a declaratory judgment deeming unconstitutional any and all statutes, ordinances, regulations, policies, procedures, customs or usages under which she was arrested, searched and incarcerated, and further requests that this Court permanently enjoin Defendants from following or enforcing such statutes, ordinances, regulations, policies, procedures, customs or usages.

WHEREFORE, Plaintiff requests a trial by jury, and further requests that she be awarded the actual and punitive damages to which she is entitled, that she be granted the declaratory and injunctive relief she has requested, and the she be awarded her costs, attorneys' fees and all other relief to which she is entitled under law or in equity.

(s) Gregory A. Bolzle
Gregory A. Bolzle
Woodward, Hobson & Fulton
2500 First National Tower
Louisville, Kentucky 40202
(502) 585-3321

*Counsel for Plaintiff*
*Karen B. Masters*

## CERTIFICATE OF SERVICE

It is hereby certified that a copy of the foregoing was mailed on this the 20th day of October, 1987 to:

Mr. N. Scott Lilly
First Assistant County Attorney
1001 Fiscal Court Building
Louisville, Kentucky 40202

*Counsel for Defendants*

Mr. R. Allen McCartney
Mr. Stuart L. Adams, Jr.
621 West Main Street
Louisville, Kentucky 40202

*Assistant County Attorneys*

# UNITED STATES DISTRICT COURT

WESTERN DISTRICT OF KENTUCKY
AT LOUISVILLE

**Civil Action No. C-87-0450-L(J)**

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KAREN B. MASTERS, - - - - - - - *Plaintiff*,

*v.*

JEFFERSON COUNTY, Et Al., - - - - *Defendants.*

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**DEFENDANTS' ANSWER TO PLAINTIFF'S FIRST AMENDED COMPLAINT**—October 29, 1987

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Come the Defendants, by counsel, and for their Answer to the Plaintiff's First Amended Complaint, state as follows:

1. The Defendants reaffirm, reiterate and reassert here each and every defense set forth in the First through Fifth Defenses of the Defendants' August 17, 1987, Answer to the Plaintiff's original Complaint.

2. Defendants admit Paragraph 7 of Plaintiff's First Amended Complaint.

3. The Defendants deny the allegations contained in Paragraphs 1, 2, 11, 20, 21, 22, 24, 26, 28, 30 and 32 of Plaintiff's First Amended Complaint.

4. Defendants are without sufficient information or belief with which to form an opinion as the truth or accuracy of the allegations contained in Paragraphs 3 and 18 of Plaintiff's First Amended Complaint and therefore deny same.

5. Defendants admit so much of Paragraph 4 alleging Jefferson County is ultimately responsible for the policies,

employment and supervision of the Jefferson County Police Department and the Metropolitan Department of Corrections, but affirmatively assert that certain aspects of the employment, training, supervision and conduct of the officers and employees of such departments are governed by state law.

6. Except as limited and qualified by the Defendants' Answer to Paragraph 4 of the Plaintiff's First Amended Complaint, the Defendants admit so much of Paragraph 5 of Plaintiff's First Amended Complaint which alleges the Jefferson County Police Department has supervisory and some training responsibilities over its officers and employees, including the establishment of a Standard Operating Procedure manual, but denies the remainder of the allegations of Paragraph 5.

7. The Defendants admit so much of Paragraph 6 of Plaintiff's First Amended Complaint which alleges the Defendant Crouch is Chief of the Jefferson County Police Department and that he has overall supervisory responsibility of the Jefferson County Police Department except as otherwise limited and qualified by the answers herein to Paragraphs 4 and 5 of the Plaintiff's First Amended Complaint.

8. Except as limited and qualified by the Defendants' Answer to Paragraph 4 of Plaintiff's First Amended Complaint, the Defendants admit so much of Paragraph 8 of Plaintiff's First Amended Complaint which alleges the Metropolitan Department of Corrections has supervisory and some training responsibilities over its officers and employees, including the establishment of a Policies and Procedure Manual, but deny the remainder of the allegations of Paragraph 8. Defendants also affirmatively assert that certain policies, including those relating to strip-searches are also governed by the Consent Decree entered in the case of *Tate* v. *Frey*, U.S. District Court for the Western District of Kentucky, No. 75-0031-(A) (October 1, 1985), which Consent Decree is binding on the instant Plaintiff.

9. The Defendants admit so much of Paragraph 9 of Plaintiff's First Amended Complaint which alleges the Defendant Richard A. Frey, Jr. is the Director of the Metropolitan Department of Corrections and that he has overall supervisory responsibility of the Metropolitan Department of Corrections except as otherwise limited and qualified by the answers herein to Paragraph 4 and 5 of the Plaintiff's First Amended Complaint.

10. The Defendants admit the first sentence of Paragraph 10 of Plaintiff's First Amended Complaint, but insofar as the second sentence of Paragraph 10 attempts to impose liability on the basis of respondeat superior, the Defendants deny Defendants Rose and Najjar are responsible under such theory for the specific acts and conduct of any Corrections employee.

11. While these Defendants are not in possession of any facts contrary to those set forth in Paragraphs 12 and 13 of Plaintiff's First Amended Complaint, they are without sufficient information or belief to verify the truth or accuracy of the allegations contained therein and therefore deny same.

12. The Defendants admit so much of Paragraph 14 of Plaintiff's First Amended Complaint alleging that Plaintiff was arrested on a bench warrant by the Defendant Barrows at approximately 3:00 to 3:30 P.M. on October 21, 1986; that the Defendant Barrow confirmed the validity of such bench warrant prior to leaving Plaintiff's residence; that Plaintiff protested her arrest in same fashion; that Plaintiff's children were taken to Plaintiff's mother's house; and that Plaintiff was transferred to the custody of Officer Calhoun at a Dixie Highway location. Defendants deny Officer Calhoun improperly handcuffed the Plaintiff. Defendants also assert the bench warrant was properly executed according to law.

13. The Defendants admit so much of Paragraph 15 that when Plaintiff was placed into the custody of the De-

partment of Corrections, she was required to remove her shoes and empty her pockets; was subjected to a "pat down" search by a female Corrections employee; was placed in a holding area for females, was required by a female Corrections employee to open her blouse, was fingerprinted and photographed before being returned to the holding area. The Defendants specifically deny the Plaintiff was required to open her blouse in front of a window or in the plain view of other persons. As to the remainder of the allegations contained in Paragraph 15, these Defendants are without sufficient information or belief to form an opinion as to their truth or accuracy and therefore deny same.

14 Defendants admit so much of Paragraph 16 that the Plaintiff was moved from the female holding area to a jail cell and prior to being placed in a cell, she was strip-searced by a female Corrections employee in a totally private room. As to the remainder of the allegations contained in Paragraph 16, these Defendants are without sufficient information or belief with which to form an opinion as to their truth or accuracy and therefore deny same.

15 The Defendants admit so much of Paragraph 17 of Plaintiff's First Amended Complaint which alleges the Plaintiff was released on her own recognizance and returned her personal property, but are without sufficient information or belief as to the truth or accuracy of the remainder of the allegations contained in Paragraph 17 and therefore deny same.

16 As the allegations contained in Paragraph 19, 23, 25, 27, 29, 31 and 33 of Plaintiff's First Amended Complaint merely incorporate previous allegations of said Complaint, Defendants reiterate and reaffirm each and every answer set forth herein to the pertinent paragraphs of Plaintiff's First Amended Complaint.

17. As Paragraph 34 of Plaintiff's First Amended Complaint seeks relief in the form of a declaratory judg-

ment and a permanent injunction and constitutes demands for legal remedies rather than factual allegations, these Defendants state Plaintiff is not entitled to such relief or remedy.

18. Any allegation of Pliantiff's First Amended Complaint not specifically admitted or otherwise answered herein, is hereby denied.

WHEREFORE, the Defendants demand as follows:

A. Plaintiff's First Amended Complaint be dismissed with prejudice at Plaintiff's cost;

B. A trial by jury on all issues so triable;

C. The Defendants be awarded their cost herein expended, including a reasonable fee for their attorneys pursuant to 42 USC § 1988; and

D. For any and all further relief to which these Defendants may appear to be entitled.

Respectfully submitted,

(s) N. Scott Lilly
N. Scott Lilly
First Assistant County Attorney
1001 Fiscal Court Building
Louisville, Kentucky 40202
(502) 625-6336
Stuart L. Adams, Jr.
R. Allen McCartney
621 West Main Street
Louisville, Kentucky 40202
(502) 587-7711

Co-Counsel for Defendants

*CERTIFICATE*

I hereby certify that a copy of the foregoing Answer to Plaintiff's First Amended Complaint was mailed, postage prepaid, this 29th day of October, 1987, to Gregory A. Bolzle and B. Todd Thompson, Woodward, Hobson & Fulton, 2500 First National Tower, Louisville, Kentucky 40202-3175, Counsel for Plaintiff.

(s) N. Scott Lilly
N. Scott Lilly

# UNITED STATES DISTRICT COURT

WESTERN DISTRICT OF KENTUCKY
AT LOUISVILLE

**Civil Action No.: C75-0031-L(A)**
**C79-0492-L(A)-24**
**C79-0570-L(A)-34**

DON TATE, et al. - - - - - - - *Plaintiffs*

*v.*

RICHARD FREY, et al. - - - - - - *Defendants*

**ORDER CERTIFYING CLASS**—Entered August 15, 1980

Motion having been made, and the Court otherwise being sufficiently advised;

IT IS HEREBY ORDERED AND ADJUDGED, that the Plaintiff class be and hereby is certified and divided into four subclasses defined as follows:

a. The first subclass, represented by JACQUELINE HUNTER, is composed of all female prisoners who are now or will be confined in the Jefferson Couuty Jail and are awaiting trial, and not serving sentence for any misdemeanor or felony conviction. This subclass shall be known as the "female pretrial detainee" subclass.

b. The second subclass, represented by DIANE BOLIN, is composed of all female prisoners who are now or will be incarcerated in the Jefferson County Jail for the purpose of serving sentence for a misdemeanor or felony conviction and shall be known as the "convicted female" subclass.

c. The third subclass, represented by ERVIN TYUS, is composed of all male prisoners who are now or will be confined in the Jefferson County Jail and are awaiting trial and not serving sentence for any misdemeanor or felony conviction. This subclass shall be known as the 'male pretrial detainee" subclass.

d. The fourth subclass, represented by HUBERT RINGO is composed of all male prisoners who are or will be incarcerated in the Jefferson County Jail for the purpose of serving sentence for a misdemeanor or felony conviction and shall be known as the "convicted male" subclass.

The Plaintiff class shall consist of the four above-defined subclasses.

(s) Charles M. Allen
Honorable Charles M. Allen
United States District Court Judge

Date 8-15-80

# UNITED STATES DISTRICT COURT

**WESTERN DISTRICT OF KENTUCKY**
**AT LOUISVILLE**

**Civil Action Numbers: C-75-0031-L(A)**
**C-79-0492-L(A), C-79-0570-L(A),**
**C-83-0254-L(A)**

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DON TATE, et al., - - - - - - - *Plaintiffs*

*v.*

RICHARD FREY, et al. - - - - - *Defendants*

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## STIPULATION FOR SETTLEMENT OF CLASS ACTION—October 1, 1985

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### PREAMBLE

The above-entitled action was brought by plaintiff Don Tate on behalf of himself and all other persons similarly situated, and evolved into a class action Proceeding under Rule 23(b)(2) of the Federal Rules of Civil Procedure, and consolidated with similar actions pursuant to the court's direction.

Plaintiff's complaint herein, as amended and supplemented, charged in substance that inmates of the Jefferson County Corrections Department were being incarcerated under conditions which violated the First, Fourth, Sixth, Eighth, Ninth and Fourteenth Amendments to the United States Constitution, in violation of Section 1983 and 1985 of Title 42 of the United States Code, and in violation of State law. That as a result of such incarceration plaintiff and other members of the class were damaged.

In this action, plaintiffs request both injunctive and declaratory relief. Plaintiffs also pray for reimbursement of their costs and expenses and for the allowance of reasonable counsel fees to their attorneys for prosecuting this action.

The named defendants have appeared and answered and have denied the material allegations of the plaintiff's complaint, as amended and supplemented.

A consolidation of actions was ordered by the court on April 14, 1980 for actions C-75-0031-L(A), C-79-0492-L(A), and C-79-0570-L(A); action C-83-0254-L(A) was consolidated on August 1, 1983.

The court, by order dated August 15, 1980, determined that this action is properly maintainable as a class action under the provisions of Rules 23(a) and 23(b)(2) of the Federal Rules of Civil Procedure, and that plaintiffs were proper representatives of the class.

In order to bring to rest the controversy between plaintiffs and the class represented by plaintiffs, and defendants; to secure total and final settlement of all claims against defendants arising out of the purported acts and omissions set forth in plaintiffs' complaint, as amended and supplemented; and to avoid further expense, inconvenience, and the distraction and hazard of burdensome and protracted litigation; the parties desire to settle, compromise, and terminate this action and all claims asserted therein, as well as any and all other claims against the defendants which are based upon or might be based upon or arise from any of the matters alleged in plaintiffs' complaint, as amended and supplemented, regardless of the legal theory on which such claims may be based.

## STIPULATIONS

I. *Population and Housing*

The main holding cell shall contain a maximum of twenty (20) inmates at any one time providing, however,

that no inmate shall be held in the main holding cell longer than a total of twelve (12) hours (Appendix page 1, area B-218). Pretrial interviews shall be conducted by a qualified pretrial services staff. All interviews will be held when the individual is in holding and shall not be delayed. Since it is necessary to continue pretrial interviews in the main holding cell area, the holding cell shall contain a maximum of twenty (20) inmates (Appendix page 1, area B-218).

The intoxication cell shall contain a maximum of six (6) inmates at any one time, and no inmate shall stay in the intoxication cell for a longer period than twelve (12) hours. The intoxication cell shall contain a toilet, sink and drinking fountain (Appendix Page 1, area 217).

The three (3) smaller holding cells shall contain a maximum of three (3) persons each at any one time. No inmate shall be housed in any of the three (3) smaller holding cells for longer than a total of twelve (12) hours. All holding cells shall contain a toilet, sink and drinking fountain (Appendix page 1, areas B-214, B-215 and B-216).

Area H-1 shall contain a maximum of nine (9) persons at any one time (Appendix page 2, area B-168). Area H-2 shall contain a maximum of fifteen (15) persons at any one time (Appendix, page 3, area B-185). Area H-3 shall contain a maximum of fifteen (15) persons at any one time (Appendix, page 3, area B-200). If, for any reason, an inmate is kept longer than the twenty-four (24) hour maximum period in holding cells H-1, H-2 or H-3, he or she shall be provided with a bed and at least sixty (60) square feet of floor space per inmate.

Subsequent to his/her appearance in arraignment court, all inmates still incarcerated shall be classified, allowed to shower and be provided with a clean jumpsuit. Each inmate appearing in State Court in the presence of a jury will be provided the opportunity to wear civilian clothing provided at the inmate's expense. All inmates appearing

in Federal Court will be provided the opportunity to wear civilian clothing provided at the inmate's expense.

There shall be no placement of inmates in corridors. Areas M-1, M-2, M-3, and M-4 may be used as an assigned housing unit for prisoners with special needs i.e., maximum security, protective custody, Federal or state in transit. Each cell shall hold one (1) person each. No person shall remain in M-1, M-2, M-3, or M-4 longer than four (4) weeks (Appendix, page 2, areas B-152, B-153, B-154, and B-155).

No person shall be detained in any holding area, or all holding areas combined, for longer than twenty-four (24) hours except areas M-1, M-2, M-3 and M-4. All other housing areas in the jail shall comply with the Commission on Accreditation for Corrections Standards for Adult Local Detention Facilities (hereinafter referred to as "CAC" or "CAC Standards" 1981 Edition). Dayrooms shall not be included in the computation for CAC Standards on square footage per person.

Each living area shall have a dayroom or recreation room. There shall be no beds, cots or any other sleeping accommodations in any dayroom.

The four (4) walks on the third floor of the Louisville Division of Police Headquarters building, 227 South Seventh Street shall be provided with completely renovated plumbing facilities including one shower for every fifteen (15) prisoners. The population shall be reduced as follows: one (1) cell on each of Walks one, two, and three; shall be renovated as a shower area. The remaining cells shall hold no more than four (4) inmates each (Appendix pages 4 and 5, areas 314, 319, and 320). Walk four (4) on the third floor shall comply with CAC Standards for inmate housing (Appendix page 6)

Nothwithstanding any of the above provisions, all inmate living areas in the jail shall comply with the CAC Standards on density.

II. *Maximum Inmate Population*

The maximum inmate population of the jail shall not exceed the following specified categorical limits, nor shall the aggregate limit of 989 inmates be exceeded without additional facilities which conform to the then existing nationally recognized minimum requirements for similar facilities.

Population Dispersement Maximum Limits

| | |
|---|---|
| Hall of Justice | |
| Basement: | |
| front holding | 35 |
| Rear holding | 92 |
| Fourth Floor | 80 |
| Fifth Floor: | |
| East | 50 |
| West | 110 |
| Sixth Floor: | |
| East | 55 |
| West | 110 |
| Louisville Division of Police | |
| Walk one | 28 |
| Walk two | 36 |
| Walk three | 36 |
| Walk four | 32 |
| Community Corrections Center | |
| First Floor | 58 |
| Second Floor | 117 |
| Third Floor | 90 |
| TOTAL | 989 |

Population Dispersement Bed Classification

The maximum number of persons classified to a bed shall not exceed 835, categorized as follows:

| | |
|---|---|
| Basement | 53 |
| 3rd Floor | 132 |
| 5th Floor | 160 |
| 6th Floor | 165 |
| Community Corrections Center | 325 |
| TOTAL | 835 |

Population Dispersement Holding

Inmates not classified to a bed and detained less than twenty four (24) hours shall not exceed 154, categorized as follows:

| | |
|---|---|
| Basement | 74 |
| 4th Floor | 80 |
| TOTAL | 154 |

Population Dispersement Non Confined Inmates

Population limitations of non-confined persons, who are under the constructive custody of the Department shall not be limited.

III. *Population Limitations Maintenance*

The maximum population limitation set forth in Section II Maximum Inmate Population shall be maintained according to the following plan.

The primary method whereby the jail shall maintain the stated maximum inmate population shall be through the informal communicative channels existing at present, and those to be developed, between the Jefferson District Court, the Jefferson Circuit Court, the Pretrial Release Agency of its Administrative Office of the Courts, and

through the Division Program of the Commonwealth's Attorney's Office. Should the population exceed any specified category of the jail, reclassified attempts shall be engaged to reallocate existing facility space to accommodate the inmate population requirements.

IV. *Classification*

All classification interviews shall be held in a quiet, private area. No more than one (1) interview will be conducted at a time per interview room. All classification interviews shall occur within twenty-four (24) hours of arrival at the jail. Classification interviews and observations shall be no shorter than the time necessary to make a complete and accurate determination of the individual's classification requirements. All classification personnel shall receive periodic training related to recognizing psychiatric problems. A psychiatrist or psychologist shall review one out of each ten (10) classifications within twenty-four (24) hours or the next working day of the original classification as a reliability check. The second review shall be done without the original classification person's knowledge of the results of the second interview. The results of the classification review shall be used in periodic reevaluation of the interview content and training program. If the results upon review by the psychologist differ from the first interview, the classification by the psychiatrist or psychologist shall take precedence. The result of all reclassification reviews shall be noted in the inmate's record, with the outcome stated. In addition, said qualified psychiatrist or psychologist shall give periodic training to all interviewers.

There shall be a written policy and procedure for inmate classification which shall be reviewed at least annually and updated if necessary in accordance with CAC standards. The goal of the classification procedure shall be to ensure

accuracy with a review toward removing low-risk inmates from the jail's population whenever possible.

V. *Community Treatment Center and Alternatives to Confinement*

The Defendants recognize the American Correctional Association's philosophy that community residential programs are viable, productive and cost-effective alternatives to confinement, and that such programs serve to reinforce and support the reintroduction of the offender to society. Defendants, therefore, agree to maintain the Community Corrections Center, and agree to exercise good faith efforts to make maximum use of the center. Male and female inmates will be incarcerated at the Center. Defendants will diligently investigate funding sources and additional programs similar to the Community Corrections Center which would serve to reintroduce the offender to society.

VI. *Educational and Vocational Programs*

In accordance with CAC standards, a written policy and procedure shall provide for educational programs and vocational counseling and vocational programs. Study materials and classes shall be organized and staffed by trained tutors for those inmates interested in obtaining a Graduate Equivalency Diploma (GED). Further, course material and texts shall be made available to those prisoners interested in post-high school study. The jail will make every effort to make and maintain appropriate community and agency contacts, soliciting volunteer teachers and tutors in all areas and at all levels of study.

A system shall be established to ensure that all educational and vocational programs meet the needs of the population. An annual evaluation shall measure the effectiveness of the educational and vocational training programs against stated performance objectives.

VII. *Citizen Involvement And Volunteers*

Defendants shall aggressively seek assistance from citizens in the community to help coordinate and staff the vocational, educational, library, recreation, religious, and other programs. A written policy and procedure shall be promulgated in accordance with CAC standards.

VIII. *Work Programs*

Within the framework of the jail, defendant's agree to provide as much meaningful employment to the inmates as possible to those desiring to work. All inmates shall be eligible for employment except those disqualified by reason of a disciplinary action or voluntary election not to work. A decision not to work shall not be used against any prisoner for any reason, nor shall it prejudice an inmate for future participation in work programs.

An inmate employment policy and procedure shall be developed by the Defendants. No inmate shall be discriminated against in the provision of a job by reason of race, color, religion, sex, or national origin, who is otherwise qualified.

Jobs shall be genuine; no more inmates shall be assigned to tasks than necessary. Prisoners classified to work assignments shall be compensated for work performed. Equal opportunity shall be afforded to females and males to apply for and hold all jobs.

IX. *Food Service*

Defendants shall comply with CAC standards on food and nutrition. In addition, a nutritionist shall review the menu at least monthly, and make unannounced checks at least monthly to ensure that the food prepared conforms to the menu. Meal content shall be altered to meet the religious needs of inmates so requesting. Daily caloric intake shall consist of no less than 2,400 calories and shall be served hot or cold as the material requires. Medically

necessary diets shall be reviewed by the staff physican and provided as necessary. Food, except accessibility to commissary items, shall not be withheld as a disciplinary action.

X. *Visitation*

Defendants agree, as a minimum, to follow CAC standards on visitation. Additionally, each prisoner is entitled to at least one fifteen-minute visit period each day, except inmates assigned to disciplinary segregation.

Visitation shall take place in pleasant surroundings and with appropriate surveillance to allow privacy. Confidential visits with attorneys shall be arranged. A written system of reservations shall be formulated for out-of-town visitors who reside outside of a fifty (50) mile radius from Louisville, Kentucky. Each inmate shall be permitted to receive one (1) special visit each week of not less than one (1) hour to be tabulated as one (1) regular visit. Prisoners shall be notified in writing of the existence and details of this reservation system. The rules of the reservation system shall be posted in the visitors' waiting area. Written rules will also be promulgated to permit visits to hospitalized inmates.

Visits may be taken away or restricted as punishment if the infraction involves violation of a department regulation. No inmate shall be handcuffed while visiting except for identifiable security reasons.

XI. *Recreation And Exercise*

Defendants shall establish a written policy providing a comprehensive program of leisure time activities. Movies, clubs, hobbies, arts and crafts and study groups comparable with those available in the community will be made available to those inmates housed in the Community Corrections Center.

There shall be separate dayroom for each dormitory and cell block. All dayrooms shall be used exclusively for re-

creation of the residents of the housing unit or cluster in which the dayroom is located. Dayrooms shall not be used for sleeping space. Each dayroom shall contain cards, board games and other activities of sufficient quantity to allow participation by all. Each and every dayroom shall contain a working television.

The gymnasium shall be open seven (7) days each week for physical exercise except for religious service on Sunday morning. All classified inmates who wish to participate shall be permitted to attend gymnasium activities at least five (5) hours per week. Defendants agree to maintain a maximum of twenty (20) to twenty-four (24) inmates in the gymnasium at any one time. Outdoor exercise, weather permitting, shall be made available every day. A full-time recreation officer shall formulate and supervise a diversified recreation program. Gymnasium scheduling should not be curtailed or altered due to staffing shortages.

XII. *Inmate Mail*

Defendants shall follow the CAC standards for inmate mail. In addition, mail shall be collected and delivered at least every twenty-four (24) hours, excluding weekends and holidays.

XIII. *Telephones*

Telephones shall be made available to all inmates except where specific disciplinary infraction regarding telephone use requires restrictions. Every person using the telephone shall be provided with a reasonable amount of privacy. There shall be no prohibitions in regard to calling the press or any other person, except where a request by that party prohibits such a call. The inmate's file shall include documentation of any and all such requests. Telephone privileges shall be removed as punishment only when an inmate substantially violates the privilege, i.e., threatening or obscene phone calls. Written policy and procedures specify

that newly admitted prisoners may complete at least two (2) local or collect long distance telephone calls during the admission process. Sufficient telephones will be made available so that waiting times are minimal.

XIV. *Library Service*

Defendants agree, at a minimum, to meet CAC standards on library services. Materials responsive to the interests and educational needs of the users should be employed in a distinct library setting. Books on black history shall be included in the selections available. Library services should be made available to prisoners on a daily basis, including evenings, weekends and holidays. Books should be made available for reasonable periods of time and Defendants agree to implement a reasonable renewal policy.

Library resources should be supplemented by local and state libraries. A staff member or trained volunteer should coordinate and supervise the library services. Defendants agree to implement a plan to utilize the Louisville Free Public Library to provide a variety of material to the inmates. Books, periodicals, magazines, newspapers, including the *Louisville Defender, Ebony, Jet,* and the daily city newspapers, shall be included. At least one (1) newspaper shall be provided per dormatory.

XV. *Personal Supplies*

Defendants shall provide prisoners, without charge, the following items: clean, properly fitted, presentable jumpsuits; toothbrushes; toothpaste; razor and blades; toilet paper; sanitary napkins for female inmates; soap; and hypo-allergenic soap as medically necessary, shall be provided upon request on the day of classification to the facility without charge.

Defendants agree to provide at least one metal mirror for each living area. Clean clothing shall be provided two (2) times per week. At the same time that clothing is col-

lected for laundering, prisoners shall immediately be given a change of clothes. The facility shall have available more clothing, linen and bedding than it will need at any one time at maximum capacity.

Defendants agree to provide a clean mattress and pillow which meet Federal fire safety standards, one (1) sheet, pillowcase and at least two (2) towels weekly. Sufficient clean blankets shall be provided at least every six (6) months to provide comfort under existing temperature conditions.

XVI. *Commissary*

The commissary shall be expanded and each inmate shall have access to the commissary once a week. The commissary shall stock, in addition to other materials, pens, paper, envelopes, stamps, and other necessary legal materials. There shall be no delays in granting indigent status to those who qualify. Such status shall be determined at the initial classification hearing and shall be updated weekly. There shall be an adjustable ceiling on the amount of money an inmate may spend for commissary. Said adjustable commissary expenditure shall be proportional to the fluctuation of the Consumer Price Index for all Urban Consumers (CPI-U) as calculated by the United States Department of Labor, Bureau of Labor Statistics. The maximum inmate commissary expenditure shall be based upon a July, 1984 CPI-U of 311.7 and a corresponding maximum per week inmate commissary expenditure of twenty-five (25) dollars. For each 12.5 points of fluctuation from a base CPI-U of 311.7, the maximum weekly inmate commissary expenditure will be adjusted one (1) dollar. Said computation will be based upon the October CPI-U statistics and become effective the first day of January for each succeeding year. The commissary shall be operated in accordance with the provisions of the Kentucky Revised Statutes governing the

operation of a jail commissary. Restrictions on combustible material quantities in cells shall be limited.

XVII. *Sanitation And Personal Grooming*

All prisoners, wherever housed, will be provided with basic cleaning materials to clean and disinfect their housing area. Minimally, buckets, rags, towels, brooms, mops, detergent, sponges, disinfectant, and cleanser shall be provided at least once per week by the Defendants.

Each inmate shall be permitted to bathe daily. Equipment shall be provided so that inmates can obtain hair care services when needed.

XVIII. *Air Conditioning, Ventilation, Heat, Water Temperature, And Light*

Pursuant to CAC standards for adult local detention facilities, an independent qualified source shall document that lighting is appropriate to all activity areas, circulation is at least ten (10) cubic feet of fresh or purified air, per minute, per occupant, and temperatures are appropriate to the summer and winter comfort zones with consideration for the activity performed. Noise levels shall be less than seventy (70) decibels during the daytime and forty-five (45) decibels at night.

XIX. *Religion*

Weekly religious services and religious counseling shall be made available to all inmates who wish to participate. Defendants agree to establish a written policy and procedure to ensure access to religious programs for all inmates who are affiliated or wish to become affiliated with religious denominations or groups. All inmates shall have free access to the clergy of their choice, unless a member of the clergy abuses this right of access. All clergy persons shall meet the statutory requirements for the Commonwealth of Kentucky. If any member of the clergy is denied access, the reasons therefore shall be clearly documented.

Defendants agree to serve pork-free meals to those inmates whose religion prohibits them from consuming pork. Defendants agree to prohibit harassment of any religious group or faith.

XX. *Due Process And Grievance Procedures*

The Defendants shall not discipline any inmate for any reason without complying in full with CAC standards.

A written grievance procedure staffed by a full-time person shall be made available to all inmates and shall include at least two (2) levels of appeal. No staff member will decide any appeal at more than one (1) level, and shall not decide a grievance about him or her. Such procedure shall be promulgated and distributed to inmates in the jail. All inmates shall have access to this procedure and will be entitled to written responses to all grievances. The reasons for all responses shall be provided. Forms shall be designed so that inmates may write their grievances and all responses shall be returned within a reasonable period of time, with special provisions for responding to emergencies. The system shall have a method of review.

XXI. *Medical And Mental Health Services*

The Defendants shall have a Health Services Administration to be present at the jail facility no less than thirty seven and one-half (37.5) hours per week. Said Health Services Administrator shall have graduated from an accredited school of nursing with a baccalaureate degree and possess all current state certifications for nursing and have at least seven (7) years of nursing experience with graduate education substituting on a year for year basis for up to three (3) years nursing experience. Uo person shall have less than four (4) years experience. The Health Services Administrator shall be responsible for development of all standard operating procedures, and recommend the hiring, supervision and firing of all other medical staff; and be

responsible for the preparation of all necessary reports, including regularized compilation of statistics.

Additional medical staff shall include no less than the following to maintain inmate/patient health care at acceptable levels but no less than those levels specified by the American Medical Association.

a. One (1) full-time nursing supervisor who is a registered nurse;
b. One (1) full-time nursing supervisor who is a licensed practical nurse;
c. Eight (8) staff nurses to provide twenty-four (24) hours care, either registered nurses or licensed practical nurses;
d. Six (6) correctional medical technicians;
e. One (1) medical records clerk;
f. Two (2) clerk typists;
g. 24 hours of licensed physician services per week; and
h. 5 hours of certified psychiatric consultation per week.
i. pharmacist or pharmaceutical consultant.

Job descriptions will be written defining the duties and responsibilities of all health care staff. All treatment and assessments by health care personnel, other than physicians must be performed following written procedures. All personnel will have current training in basic first aid as defined by the American Red Cross. All health care personnel, and at least one (1) correction officer per shift in each living area, shall have cardiopulmonary resuscitation (C.P.R.) training. The mental health unit shall be staffed twenty-four (24) hours per day by qualified and trained staff. Psychiatric patients shall be constantly supervised by staff trained in the recognition of psychological disorders. The psychologist, in conjunction with nursing staff, will make recommendations about who is to be assigned to or removed from the psychiatric housing area. Psycho-

tropic or other prescription medication will not be prescribed to psychiatric patients except by a licensed physician.

All infirmary beds and medical holding cells shall have access to an emergency notification system or intercom for the occupant to contact medical staff. Medical cells shall house only those with minor problems, not the acutely ill. Health care staff shall visit these cells several times per day.

Upon arrival, all inmates shall be notified in writing how to obtain the needed attention of the medical staff and shall receive a screening examination. The health screening shall be designed and supervised by the Medical Director, who shall also ensure that screeners have appropriate training. Each person who is incarcerated fourteen (14) consecutive days shall receive within this fourteen (14) day period a complete health appraisal performed by a qualified health professional. This health appraisal will include at least a complete history and physical exam, baseline urine test, and screening for syphillis and tuberculosis.

Physicians sick call shall be held daily and the encounter documented in the patients' charts. A system of medical records shall be developed which begin at entry into the jail. A follow-up system shall be established.

Appropriate transportation to University Hospital or other emergency care locations shall be developed. Procedures shall be well defined and in writing. Staffing shall be adequate to provide transportation.

A part-time pharmacist or consultant shall be hired to develop drug profile sheets and drug dispensing records. A drug formulary shall be developed.

The health care delivery system at the jail will be monitored periodically by the Jefferson County Medical Society or other outside agency designated by the Society. Statistics, policies and procedures, selected records, review of staff patterns, on-site health unit inspections, and inter-

views with prisoners shall be included, at the very least, in such monitoring.

All inmate dental problems shall be referred to a qualified dentist who shall be present at the jail no less than eight (8) hours per week.

XXII. *Access to Court*

Defendants agree to comply with the requirements of *Fluhr* v. *Roberts,* 460 F. Supp. 536 (W.D. Ky. 1978), for providing legal materials and books to inmates. In addition, the law books requested shall be provided to the inmate within forty-eight (48) business hours of the request unless unavailable, and then as soon as thereafter the material becomes available. Inmates shall be allowed to retain such materials for a period of forty-eight hours. Writing materials shall be provided as necessary. A typewriter shall be made available to inmates wishing to use one for legal purposes. A sufficient amount of typing paper shall be made available. Defendants further agree to make available a comprehensive index of the available legal materials under the control of the jail and the Jefferson County Law Library to all inmates on their arrival.

XXIII. *Searches*

Defendants agree to establish policies addressing the search of inmates and inmate's property. Defendants shall have wide ranging discretion and latitude concerning the search of inmates and all areas and materials within the facility. The search policies should provide for the avoidance of unnecessary force, embarrassment or indignity to the inmates. The use of non-intrusive sensors and other techniques of body inspection are encouraged.

Frequent unannounced searches of inmates, inmate living areas, the physical structure of the building and employees will be conducted as often as necessary to ensure the safety and security of the facility and all persons therein.

Definitions:

a. Frisk Search—A search of the person which is conducted by an employee touching the outer clothing of an inmate and feeling for large objects of contraband. Outer clothing such as coats, shoes, and hats are removable.

b. Strip Search—A search of the person which is conducted by an employee by visually inspecting the person following removal by the inmate of the inmate's clothing.

c. Body Cavity Search—A medically conducted search of the inmate's interior areas of body conducted under medical conditions, by medical personnel and with probable cause that the person has concealed within a body cavity or elsewhere within the body contraband.

The following general guidelines are incorporated into the jail search policies.

a. All inmates under the control of the jail are subject to search at all times.

b. Inmates will be searched by employees of their gender.

c. All strip and body cavity searches will be conducted in private.

d. All inmates entering or leaving the security perimeter will be strip searched, except inmates in the front holding areas who will only be strip searched upon reasonable belief that a strip search is required for security purposes as described in item "g" below.

e. All inmates coming into direct contact with a visitor will be strip searched.

f. All inmate property and living areas are subject to search at all times.

g. All inmates are subject to strip search upon reasonable belief that the inmate may be in possession of contraband.

h. All inmates are subject to frisk search at all times.

i. Inmates are subject to body cavity searches based upon probable cause supported by oath or affirmation.

XXIV. *Employee Training*

The jail shall conform the employee training program to the Training and Staff Development Standards promulgated by the Commission on Accreditation for Corrections, Second Edition. The following training requirements shall be included in the jail employee training program.

Departmental policy and procedure shall provide that the training programs for all employees are specifically planned, coordinated and supervised by a qualified employee at the supervisory level, and that the training program be formally reviewed annually. An advisory training committee composed of the Departmental training staff and representatives from major Departmental divisions shall be formed for evaluation and curriculum development purposes, and meet at least quarterly to review training progress and to resolve issues. Said committee shall maintain a written record of the topics discussed during the meeting. Said quarterly meetings shall not be open to the public under the Kentucky Open Meeting Statutes nor shall their minutes be considered public records. The training program shall provide for an ongoing formal evaluation of all pre-service, in-service, and specialized training programs with a written evaluative report prepared annually. Said supervisor employee shall receive specialized training for the position; at a minimum this employee will complete a forty (40) hour training program designed specifically for training personnel.

Employees shall, at a minimum receive the following training stipulated per category of employment.

a. *Full time employees - New*

All full time employees shall receive forty (40) hours of orientation prior to being independently assigned to a particular job. This orientation is to include:

—Orientation to the purpose, goals, policies and procedures of the Jefferson County Corrections Department and Jefferson County Government;

—working conditions and regulations;

—responsibilities and rights of employees;

—an overview of the correctional profession; and

—preparatory instruction for the employee's first duty assignment.

b. *Clerical and Support Employees - Minimal Inmate Contact*

Clerical and support employees are considered those who have minimal inmate conduct and whose work stations are not within the security perimeter of the jail. Said employees shall receive an additional sixteen (16) hours of training during the first year of employment, excluding the forty (40) hours of training provided in Section XXIV, Subsection a, and sixteen (16) hours of training each year thereafter.

c. *Professional Specialists - Regular Inmate Contact*

Regular inmate contact professional specialists shall receive forty (40) hours of initial training plus forty (40) hours of additional training during the first year of employment and forty (40) hours of training each year thereafter. Physicians and attorneys shall comply with their respective professions currency requirements.

d. *New Correctional Officers*

All new correctional officers shall receive forty (40) hours of initial training plus an additional one hundred and

twenty (120) hours of additional training during the first year of employment and an additional forty (40) hours of training each year thereafter. This training shall include training addressing the following topics: security procedures, supervision of inmates, use of force, report writing, inmate rules and regulations, inmate rights and responsibilities, emergency procedures, firearm training, key control, interpersonal relations, cultural life styles of inmates, communication skills and first aid.

e. *Administrative and Management Employees*

Administrative and management employees shall receive an initial forty (40) hours of training plus an additional forty (40) hours of training during the first year of employment, plus, forty (40) hours of training each year thereafter. A newly hired employee is an employee intially hired on or after approval of this Stipulation for Settlement of Class Action by the Federal District Court.

XXV. *Discrimination*

Defendants agree not to discriminate against any inmate on the basis of race, color, religion, sex, or national origin and to develop educational curricula addressing minority cultures which are designed to eliminate the effects of cultural disparity among prisoners and staff. Those inmates placed in administrative segregation for non-punitive purposes shall not be denied the rights and priviledges of other inmates.

XXVI. *Consent Decree Implementation*

The following Consent Decree Implementation schedule will be followed to achieve full implementation within eighteen (18) months of Judgment and Final order.

| Item | | Time in Months from Date of Court Approval |
|---|---|---|
| I. | Population and Housing | |
| | Construction-Begin | |
| | Holding Cells | 18 |
| | Third Floor | 18 |
| | Operations | 1 |
| II. | Maximum Inmate Population | 3 |
| III. | Population Limitation Maintenance | 3 |
| IV. | Classification | 1 |
| V. | Community Treatment Center and Alternatives to Confinement | 1 |
| VI. | Educational and Vocational Programs | 1 |
| VII. | Citizen Involvement and Volunteers | 1 |
| VIII. | Work Programs | 1 |
| IX. | Food Service | 1 |
| X. | Visitation | 1 |
| XI. | Recreation and Exercise | 1 |
| XII. | Inmate Mail | 1 |
| XIII. | Telephones | 1 |
| XIV. | Library Service | 1 |
| XV. | Personal Supplies | 1 |
| XVI. | Commissary | 1 |
| XVII. | Sanitation and Personal Grooming | 1 |
| XVIII. | Air Conditioning, Ventilation, Heat, Water, Temperature and Light | 1 |
| XIX. | Religion | 1 |
| XX. | Due Process and Grievance Procedures | 1 |
| XXI. | Medical and Mental Health Services | 1 |
| XXII. | Access to Court | 1 |
| XXIII. | Searches | 1 |
| XXIV. | Employee Training | 1 |

## OBLIGATIONS

Each party shall comply fully and promptly, according to the above stated Implementation Schedule, and the below specified Enforcement Provisions, with all terms and provisions of the Stipulation for Settlement of Class Action. All claims asserted in this action, and any and all other claims against the defendants, or any of them individually, which are based on or could be based on, or could arise from any of the matters alleged in plaintiff's complaint, as amended or supplemented, regardless of the legal theory on which they are based, shall be dismissed by the court with prejudice.

## ENFORCEMENT PROVISIONS

Nothing incident or relating to this Stipulation for Settlement of Class Action or any provision hereof, including but not limited to negotiations and public announcements, may be used by any party against any other party in this action or in any other action, except to enforce the rights and obligations of the respective parties arising out of the provisions of this Stipulation for Settlement of Class Action. The limitation set forth in this paragraph shall survive the termination of the settlement prior to its final consumation, if such should occur.

This Stipulation for Settlement of Class Action is not, and shall not be construed to be either an admission by defendants of the validity of any of the claims asserted in this action, or the liability for any claim thereof, or of any wrongdoing whatsoever, or address any individual claims for damages, nor shall the Stipulation for Settlement of Class Action be construed as an admission by plaintiffs of any lack of merit in their allegations. Any statements or arguments made on behalf of any plaintiff or defendant or in support of the settlement shall not be used as evidence in any way in any subsequent trial, proceeding, or hearing

either in this action or in any other action or proceeding between the parties thereto, should such occur.

If this Stipulation for Settlement of Class Action, as herein provided, is not approved by the court, then this Stipulation for Settlement of Class Action, shall be considered as cancelled and void and of no force or effect; and all parties to this action and to this Stipulation of Settlement of Class Action shall stand in the same position without prejudice as if the stipulation had not been entered into and submitted to the court for its consideration and approval.

It is agreed that for any violation of this decree, Plaintiffs shall first refer the complaint or violation to the Inmate Grievance System of the Jefferson County Corrections Department and exhaust all administrative remedies. Second, if the Inmate Grievance System and administrative remedies prove unsatisfactory to the Plaintiffs, the Plaintiffs shall cause their Attorney(s) to contact the Defendants and together make every reasonable effort to identify and correct the violation prior to the Plaintiffs seeking recourse to the Court.

It is recognized that some obligations of the Defendants may be in excess of those constitutionally required, and therefore, if any provision herein agreed to becomes unreasonably burdensome either Party may petition, with notice to the other Party, the court to amend this Stipulation for Settlement of Class Action. Parole evidence will be permitted to explain ambiguous terms of the Stipulation of Class Action.

(s) Lisa N. Stalls
Representing the Class of:
Female Pre-Trial Detainees

(s) Portia Seabolt
Representing the Class of:
Convicted Females

(s) Stephen L. White
Representing the Class of:
Male Pre-Trial Detainees

(s) Eric C. Hardy
Representing the Class of:
Convicted Males

(s) W. Waverly Townes
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(s) Ellen G. Friedman
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Approved as to form and legality.

(s) Allen P. Dodd, III
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(s) Eleanor F. Martin
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425 W. Muhammad Ali Blvd.
Louisville, Kentucky 40202
502-584-1254

(s) Charles M. Allen
Charles M. Allen
Chief Judge
Date: 10-1-85

# UNITED STATES DISTRICT COURT

**WESTERN DISTRICT OF KENTUCKY**
**AT LOUISVILLE**

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**Civil Action No. C-87-0450-L(J)**

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**AFFIDAVIT**—December 16, 1987

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Comes the Affiant, Teresa Banks, and after being duly sworn, states as follows:

1. That she is a denfendant in *Karen B. Masters* v. *Jefferson County*, C-87-0450-L(J).

2. That she is employed by Jefferson County at the Metropolitan Department of Corrections, 600 West Jefferson Street, Louisville, Kentucky 40202, and has been employed by Jefferson County since September 14, 1982.

3. That the Affiant was employed by the Corrections Department on October 21, 1986, and according to departmental records conducted the initial search of the Plaintiff. That Affiant is familiar with and knowledgeable of the search provisions of the *Tate* v. *Frey* consent decree and the search policy of the Corrections Department. That the Affiant has always followed said provisions of the *Tate* v. *Frey* consent decree and departmental search policies with respect to an inmate search. That the Affiant searches all female prisoners in the same manner without deviation. Said frisk and pat search being conducted as follows:

a) A frisk or pat search is initiated in the grill area where a search is begun for bulky items of contraband. The search is continued and followed up in a single cell whereupon, while fully clothed, the inmate is directed to untuck her blouse, if any, from her skirt or slacks and to turn bra cups inside out and blouse up to check for contraband.

b) That at no time during this procedure is anyone able to view the female inmate because Affiant stands in the doorway blocking the approximately 4" x 6" door window with Affiant's person and Affiant further holds the door in a closed position. Affiant further states that at no time during this phase of the pat search does the woman remove or unfasten any article of clothing which would result in the exposure of the female prisoner's person.

FURTHER THE AFFIANT SAYETH NOT.

(s) Teresa Banks
Teresa Banks

State of Kentucky
County of Jefferson

Subscribed and sworn to before me by Teresa Banks, this the 16th day of December, 1987.

My Commission Expires: 10-1-88.

(s) Judy M. Jennett
Notary Public, State at Large, Ky.

# UNITED STATES DISTRICT COURT

**Civil Action No. C-87-0450-L(J)**

**WESTERN DISTRICT OF KENTUCKY**
**AT LOUISVILLE**

---

KAREN B. MASTERS, - - - - - - - *Plaintiff*.

*v.*

JEFFERSON COUNTY, et al., - - - - - *Defendants*.

---

## AFFIDAVIT—December 10, 1987

Comes the Affiant, Vicki Wimbs, and after being duly sworn, states as follows:

1. That she is a defendant in *Karen B. Masters* v. *Jefferson County*, C-87-0450-L(J).

2. That she is employed by Jefferson County at the Metropolitan Department of Corrections, 600 West Jefferson Street, Louisville, Kentucky 40202, and has been employed by Jefferson County since January 13, 1986.

3. Affiant states that she is familiar with and knowledgeable of the search provisions of the *Tate* v. *Frey* Consent Decree and Corrections Department policy related to search of prisoners. That Affiant was employed by the Corrections Department on October 21, 1986, as an officer in the female section of the jail. That the Defendant has no knowledge or recollection of the Plaintiff, Karen B. Masters, herein.

4. That the Defendant is responsible for the transportation and the search of prisoners pursuant to departmental policy. That the Affiant conducts all strip searches of any female prisoner in private pursuant to the *Tate* v. *Frey*

Consent Decree and Corrections Department policy. That the strip search described by the Plaintiff in her Complaint comforms to the Consent Decree and Corrections Department policy.

FURTHER THE AFFIANT SAYETH NOT

(s) Vicki Wimbs
Vicki Wimbs

State of Kentucky
County of Jefferson

Subscribed and sworn to before me by Vicki Wimbs, this the 10th day of December, 1987.

My Commission Expires: 3-14-88.

(s) Patricia A. Berry
Notary Public, State at Large, KY

Supreme Court, U.S.
FILED
NOV
JOSEPH F. SPANIOL, JR.
CLERK

No. 89-576 (2)

IN THE

# SUPREME COURT OF THE UNITED STATES

October Term, 1989

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**RICHARD A. FREY, JR.**, Director,
Metropolitan Corrections Department,
**THERESA BANKS** and **VICKI WIMBS**,
Corrections Officers, and
**WILLIAM P. ROSE** and **LARRY NAJJAR**,
Corrections Sergeants - - - - - Petitioners

*versus*

**KAREN B. MASTERS** - - - - Respondent

---

On Petition for Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

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## RESPONDENT'S BRIEF IN OPPOSITION

---

**GREGORY A. BOLZLE**
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*Counsel for Respondent*

Due Date:
November 3, 1989

WESTERFIELD-BONTE CO., 619 W. KENTUCKY—P.O. BOX 3251, LOUISVILLE, KY.

23pp

## QUESTION PRESENTED

Are Petitioners entitled to qualified immunity from liability for their strip-search of Respondent, who was arrested for minor traffic offenses and whose conduct gave Petitioners no probable cause to believe she was concealing weapons or contraband?

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No. 89-576

IN THE

# SUPREME COURT OF THE UNITED STATES

October Term, 1989

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RICHARD A. FREY, JR., Director,
Metropolitan Corrections Department,
THERESA BANKS and VICKI WIMBS,
Corrections Officers, and
WILLIAM P. ROSE and LARRY NAJJAR,
Corrections Sergeants - - - *Petitioners*

*v.*

KAREN B. MASTERS - - - - *Respondent*

---

ON PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

---

## RESPONDENT'S BRIEF IN OPPOSITION

---

## STATEMENT OF THE CASE

Petitioners strip-searched Respondent pursuant to a local jail policy requiring that "[a]ll newly admitted inmates to the department . . . be . . . strip-searched immediately prior to" entering the jail's general population (Petition, p. 12, n. 4). This is a blanket strip-search policy under any definition of the term.

Respondent was arrested in the middle of the afternoon while at home with her two children. The warrants issued for Respondent's arrest specified minor

traffic violations, but the real cause of her arrest—her purported failure to appear for a court hearing—was an equally minor offense. Neither Respondent's offense nor her conduct created any suspicion that she concealed weapons or contraband anywhere on her person, much less in a body cavity. The only justification for Respondent's strip-search was that she was about to enter the general population of the local jail.

## SUMMARY OF ARGUMENT

Petitioners have no qualified immunity for their strip-search of Respondent because:

1. The unlawfulness of Petitioners' strip-search of Respondent was apparent in light of pre-existing law. Federal courts have consistently condemned blanket strip-searches of persons arrested for minor offenses, and have repeatedly held that strip-searches of minor offenders cannot be justified on the basis of administrative convenience.

2. *Dobrowolskyj* v. *Jefferson County,* 823 F. 2d 955 (6th Cir. 1987), *cert. denied,* — U.S. —, 108 S. Ct. 1012 (1988) is irrelevant to this case. *Dobrowolskyj* was rendered after, not before, Respondent's strip-search, and thus was not a part of the pre-existing law that established the constitutional parameters of Petitioners' conduct. Moreover, the Sixth Circuit concluded that its opinion in *Dobrowolskyj* was inapplicable to this case because Respondent, unlike Dobrowolskyj, was a minor offender.

3. The Consent Decree in *Tate* v. *Frey,* No. 75-0031-L(A) does not justify or endorse Petitioners' strip-search of Respondent. First, Respondent is not a member of the class made the subject of the Consent Decree. Second, the Consent Decree is ambiguous, and can be read to prohibit the strip-search to which Respondent was subjected in this case. Third, a consent decree is merely an agreement between litigants to settle pending litigation, and cannot constitute part of the pre-existing law against which Petitioners' conduct must now be measured.

## ARGUMENT

### I. The Scope of Qualified Immunity and "Clearly Established Law".

In *Harlow* v. *Fitzgerald,* 457 U.S. 800 (1982), this Court described the defense of qualified immunity as follows:

> If the law at the time [of the incident complained of] was not clearly established, an official could not reasonably be expected to anticipate subsequent legal developments, nor could he fairly be said to "know" that the law forbade conduct not previously identified as unlawful. . . . If the law was clearly established, the immunity defense ordinarily should fail, since *a reasonably competent official should know the law governing his conduct.*

*Id.* at 818 (emphasis added). The Court subsequently defined the scope of "clearly established law" in *Anderson* v. *Creighton,* 483 U.S. 635 (1987):

> The contours of the right must be sufficiently clear that a reasonable official would understand that what he is doing violates that right. *This is not to say that an official action is protected by qualified immunity unless the very action in question has previously been held unlawful.* . . ; but it is to say that in the light of pre-existing law the unlawfulness must be apparent.

*Id.* at 640 (emphasis added). Thus, pre-existing case law specifically condemning the particular conduct in issue is not required to defeat a claim of qualified immunity.

In its decision below, however, the Sixth Circuit measured Petitioners' conduct against a stricter standard of "clearly established law", one that required case law that directly prohibited the conduct alleged. The Sixth Circuit's standard was set forth in *Ohio Civil Service Employees Assn.* v. *Seiter,* 858 F. 2d 1171 (6th Cir. 1988):

> To find a clearly established constitutional right, a district court must find binding precedent by the Supreme Court, its Court of Appeals or itself. In an extraordinary case, it may be possible for the decisions of other courts to clearly establish a principal of law. *For the decisions of other courts to provide such "clearly established law" these decisions must both point unmistakably to the unconstitutionality of the conduct complained of and be so clearly foreshadowed by applicable direct authority as to leave no doubt in the mind of a reasonable officer that his conduct, if challenged on constitutional grounds, would be found wanting.*

*Id.* at 1177 (emphasis added).

In its opinion below, the Sixth Circuit concluded that blanket strip-searches of minor offenders had been so consistently and universally condemned for so long that this action constituted "an extraordinary case" under its opinion in *Seiter,* and justified reliance on decisions of the Fourth, Seventh, Ninth and Tenth Circuits condemning blanket strip searches of minor offenders (Petition, pp. 10a-13a). Even under its more restrictive test of "clearly established law", the Sixth Circuit concluded that the pre-existing decisions of the other circuits "point[ed] unmistakably to the unconstitutionality of the conduct complained of and . . . [left] no doubt in the mind of [Petitioners] that [their] conduct, if challenged on constitutional grounds, would be found wanting."

## II. The Prohibition Against Blanket Strip-Searches of Minor Offenders Was Clearly Established.

"No published state or federal case since [1966] . . . upholds the constitutionality of a blanket policy of strip-searches of minor offense arrestees. . . ." *Ward* v. *County of San Diego,* 783 F. 2d 1385, 1388 (9th Cir. 1986). In *Bell* v. *Wolfish,* 441 U.S. 520 (1979), this Court stated that the kind of body-cavity search to which Respondent was subjected in this case "instinctively gives us the most pause," and after recognizing the Fourth Amendment's prohibition of unreasonable searches, said:

> The test of unreasonableness under the Fourth Amendment is not capable of precise definition or

> mechanical application. In each case, it requires a balancing of the need for the particular search against the invasion of personal rights that this search entails. Courts must consider the scope of the particular intrusion, the manner in which it is conducted, the justification for initiating it, and the place in which it is conducted.

*Id.* at 558-59.

With these principles in mind, the federal courts have repeatedly condemned blanket strip-searches of persons arrested for minor offenses. As the Sixth Circuit recognized in *Dobrowolskyj* v. *Jefferson County*, 823 F. 2d 955 (6th Cir. 1987), *cert. denied*, — U.S. —, 108 S. Ct. 1012 (1988):

> The majority of the circuits have held unconstitutional blanket strip-search policies of all inmates including those detained only on minor misdemeanor or traffic offenses. These courts have held that automatic strip-searches of all detainees violate the Fourth Amendment without a reasonable suspicion, based on the nature of the charge, the characteristics of the detainee, or the circumstances of the arrest, that the detainee is concealing contraband.

*Id.* at 957, *citing Weber* v. *Dell*, 804 F. 2d 796 (2nd Cir. 1986), *cert. denied*, 483 U.S. 1020 (1987); *Logan* v. *Shealy*, 660 F. 2d 1007 (4th Cir. 1981), *cert. denied*, 455 U.S. 942 (1982); *Stewart* v. *Lubbock County, Texas*, 767 F. 2d 153 (5th Cir. 1985), *cert. denied*, 475 U.S. 1066 (1986); *Mary Beth G.* v. *City of Chicago*, 723 F. 2d 1263 (7th Cir. 1983); *Jones* v. *Edwards*, 770 F. 2d 739 (8th Cir. 1985); *Giles* v. *Ackerman*, 746 F. 2d 614

(9th Cir. 1984), *cert. denied,* 471 U.S. 1053 (1985); *Hill* v. *Bogans,* 735 F. 2d 391 (10th Cir. 1984); *Fann* v. *City of Cleveland,* 616 F. Supp. 305 (N.D. Ohio 1985); *Tinetti* v. *Wittke,* 479 F. Supp. 486 (E.D. Wisc. 1979), *aff'd,* 620 F. 2d 160 (7th Cir. 1980) (per curiam).

Before this case, the Sixth Circuit had not addressed the constitutionality of blanket strip-searches of minor offenders. The law in the circuit, though, clearly foreshadowed its opinion in this case. In *Dufrin* v. *Spreen,* 712 F. 2d 1084 (6th Cir. 1983), the Sixth Circuit considered whether a woman's Fourth Amendment rights were violated when she was strip-searched after being arrested on a warrant which charged that she had assaulted her step-daughter with a broom handle. The Sixth Circuit found that the strip-search did not violate the Fourth Amendment because the plaintiff was arrested for felonious assault, a violent crime. The Sixth Circuit specifically distinguished cases like *Logan* v. *Shealy and Tinetti* v. *Wittke, supra,* because those cases "involved misdemeanors, traffic offenses or similar minor offenses not normally associated with weapons or contraband." *Id.* at 1088.

In *Fann* v. *City of Cleveland, supra,* the district court analyzed the Sixth Circuit's opinion in *Dufrin.* The district court noted that because *Dufrin* involved a felony, the Sixth Circuit had not considered the constitutionality of blanket strip-searches of minor offenders. As stated by the district court in *Fann:*

> The constitutional issue left unanswered in *Dufrin* must now be decided. . . . Because the record

> indicates that [the plaintiff] was strip-searched following arrest for minor offenses and that no police officer possessed any reasonable suspicion that she was carrying or concealing contraband, her Fourth and Fourteenth Amendment rights were violated.

616 F. Supp. at 312-13.

The opinions of other circuit courts, directly on point, left the Sixth Circuit no choice but to reject Petitioners' claim of qualified immunity. For instance, in *Weber* v. *Dell, supra,* a minor offender was strip-searched before entering the general jail population pursuant to a policy requiring the strip search of all inmates except those placed in "holding cells." The Second Circuit joined "ten opinions from seven [other] circuits that succeeded *Wolfish* and 'refused to condone strip/body cavity searches of *all* arrestees entering the jail'." 804 F. 2d at 801, *quoting Weber* v. *Dell,* 650 F. Supp. 255, 259 (W.D. N.Y. 1986) (emphasis in original). In condemning the search of the plaintiff as unconstitutional, the Second Circuit held that only a "reasonable suspicion that the arrestee is concealing weapons or other contraband based on the crime charged, the particular characteristics of the arrestee, and/or the circumstances of the arrest" can legitimize "so intrusive and demeaning an investigative procedure as a strip/body cavity search." 804 F. 2d at 802. In *Walsh* v. *Franco,* 849 F. 2d 66 (2nd Cir. 1988), the Second Circuit reaffirmed its conclusion in *Weber* that the constitutional prohibition against strip-searching

minor offenders simply because they were about to enter the general population of a jail had been clearly established *since June of 1983*. *Id.* at 69. The Second Circuit's opinions in *Weber* and *Walsh* were also consistent with the opinions of other federal courts that had repeatedly held that blanket strip-searches of minor offenders could not be justified on the basis of administrative convenience. *See, e.g., Hill* v. *Bogans, supra,* at 394; *Logan* v. *Shealy, supra* at 1013; *Tinetti* v. *Wittke, supra,* at 490-91.

Given these authorities, there could be no question in the minds of the panel below that the unlawfulness of Petitioners' conduct was apparent in the light of pre-existing law.

### III. *Dobrowolskyj* v. *Jefferson County* is Irrelevant to This Case.

The Sixth Circuit's opinion in *Dobrowolskyj* v. *Jefferson County,* 823 F. 2d 955 (6th Cir. 1987), *cert. denied,* — U.S. —, 108 S. Ct. 1012 (1988), on which Petitioners place so much reliance, was rendered after, not before, Respondent's strip-search. Thus, it could not form a part of the *pre-existing* law on which Petitioners could have relied in strip-searching Respondent. Moreover, *Dobrowolskyj* is clearly distinguishable from this case and supports Respondent's position, not Petitioners'.

In *Dobrowolskyj,* the Sixth Circuit considered the very strip-search policy in issue in this case. The court held that the policy was constitutional as applied to the appellant only after noting that "Dobrowolskyj was

not charged with a traffic offense or other minor misdemeanor but with menacing. . . ." Having distinguished Dobrowolskyj from minor offenders like Respondent, the Court continued: "*Based upon the nature of the menacing charge,* the jail official certainly had . . . reason to suspect Dobrowolskyj of concealing weapons or other contraband. . . ." *Id.* at 958 (emphasis added).

*Dobrowolskyj,* then, does not expressly or implicitly approve Petitioners' strip-search of a minor offender like Respondent. The Sixth Circuit's opinion in *Dobrowolskyj* is characterized throughout by its recognition that "[m]enacing is an offense that is associated with weapons, and may well raise a reasonable suspicion on the part of the jail officials that a person detained on that charge may be concealing weapons or other contraband." Accordingly, the Sixth Circuit had little difficulty in concluding that in the circumstances of Dobrowolskyj's case, "[t]he jail had a legitimate interest in preventing the flow of contraband into the other sections of the jail," and that "the security interest of the jail outweigh[ed] the privacy interest of the inmates. . . ." *Id.* at 958-59. These security considerations simply were not present in Respondent's case. It was for these reasons that the Sixth Circuit and the district court concluded that *Dobrowolskyj* was inapplicable to this case.

**IV. The *Tate* v. *Frey* Consent Decree Does Not Immunize Petitioners' Strip-Search of Respondent.**

As has already been discussed, Petitioners strip-searched Respondent pursuant to a local jail policy, not the Consent Decree in *Tate* v. *Frey,* No. 75-0031-L(A). That policy required that "[a]ll newly admitted inmates to the department . . . be . . . strip-searched immediately prior to" entering the jail's general population (Petition, p. 12, n. 4). The policy therefore prescribes conduct squarely condemned by *Weber* v. *Dell, supra,* and other similar cases. The Consent Decree neither justifies nor endorses such a policy.

The Consent Decree was entered by Judge Charles M. Allen on October 1, 1985. It covers four subclasses of inmates in the Jefferson County Jail, which are defined in Judge Allen's Order Certifying Class of August 15, 1980. Female inmates are broken into two subclasses, one for those serving sentences for misdemeanor or felony *convictions,* and the other for those in jail *awaiting trial* (Petition, p. 49a).

The purpose of these classifications was "to insure accuracy with a view toward removing low-risk inmates from the jail's population whenever possible" (Petition, pp. 57a-58a). Petitioners were directed to "establish policies addressing the search of inmates and inmate's property [that] provide for the avoidance of unnecessary force, embarassment or indignity to the inmates" (Petition, p. 68a). It was pursuant to this requirement that the internal policy that governed

Respondent's strip-search was subsequently promulgated. The Consent Decree then provided as follows:

> d. All inmates entering or leaving the security perimeter will be strip-searched, except inmates in the front holding area who will only be strip-searched upon *reasonable belief* that a strip-search is required for security purposes as described in item "g" below.
>
> * * * * *
>
> g. All inmates are subject to strip-search upon *reasonable belief* that the inmate will be in possession of contraband.

(Petition, pp. 69a-70a).

The Consent Decree extends only to convicted female inmates and those incarcerated while waiting for trial. It does not apply to Respondent. She was not formally charged with a crime or arraigned. In fact, she was released without a hearing, without bail and on her own recognizance after her arrest and strip-search.[1]

Moveover, even a brief comparison of Petitioners' internal strip-search policy with the provisions of the Consent Decree reveals significant differences. The

---

[1]There is no support for Petitioners' claim that both of the lower courts concluded that Respondent was a member of the subject class (Petition, pp. 10-11). The district court's "finding" is part of its recitation of Petitioners' arguments (Petition, p. 21a-22a). The Sixth Circuit's "finding" is merely an acknowledgment that the district court found that the strip-search was the result of a local jail policy promulgated pursuant to the Consent Decree (Petition, p. 4a).

Consent Decree prohibits the strip-search of inmates entering the "security perimeter" from "the front holding areas"—where Respondent was originally held —unless there exists "reasonable belief that the inmate will be in possession of contraband". These limitations do not appear in the internal policy that governed Respondent's strip-search. More importantly, there is no explanation or justification for Petitioner's abandonment of the "reasonable belief" requirement set forth in the Consent Decree. If the "front holding areas" are to be considered part of the "security perimeter," then there is nothing in the Consent Decree to justify the strip-search of an inmate once he or she is moved from the front holding area to another part of the security perimeter except a reasonable belief that the inmate may have contraband. If the "front holding areas" are not part of the "security perimeter," then the Consent Decree can be read either to except inmates in the front holding areas from the general strip-search policy generally, or only when they are in the front holding areas.

If the Consent Decree does not affirmatively prohibit the strip-search that occurred in this case, in letter or spirit, then it is at most ambiguous and must be interpreted in a manner consistent with pre-existing law. Judge Edward H. Johnstone, the district court judge in this case, was constrained by his own opinion in *Kendrick* v. *Bland,* 586 F. Supp. 1536 (W.D. Ky. 1984), in which he held:

> In the context of civil rights cases, the purpose of an ambiguous provision [of a consent decree] should be determined, not only by reference to contractual aids to construction, *but also by reference to the constitutional rights sought to be vindicated in the litigation.* . . . Civil rights consent decrees are distinctive in their attempt to protect basic individual liberties. The court must insure these liberties are not frustrated by an overly narrow construction of the decree.

*Id.* at 1548 (emphasis added).

There is nothing in the Consent Decree to endorse or support a policy of strip-searching minor offenders simply because they are about to intermingle with the jail's general population.

More importantly, consent decrees are not "law" and address no legal principle. A consent decree is, essentially, a contract between parties to a dispute to resolve their differences and settle litigation. *Firefighters* v. *Cleveland,* 478 U.S. 501, 519 (1986); *Kasper* v. *Board of Election,* 814 F. 2d 332, 338 (7th Cir. 1987); *Collins* v. *Thompson,* 679 F. 2d 168, 170 (9th Cir. 1982). As this Court noted in *United States* v. *Armour & Co.,* 402 U.S. 673, 681-82 (1971):

> Consent decrees are entered into by parties to a case after careful negotiation has produced agreement on their precise terms. The parties waive their right to litigate the issues involved in the case and thus save themselves the time, expense, and inevitable risk of litigation. Naturally, the agreement reached normally embodies a compro-

> mise; in exchange for the saving of cost and elimination of risk, the parties each give up something they might have won had they proceeded with the litigation. Thus, the decree itself cannot be said to have a purpose; rather the parties have purposes, generally opposed to each other, and the resultant decree embodies as much of those opposing purposes as the respective parties have the bargaining power and skill to achieve.

For this reason, consent decrees offer the signatories no immunity from liability for illegal or unconstitutional conduct. For example, in *Birmingham Reverse Discrimination Litigation,* 833 F. 2d 1492 (11th Cir. 1987), *cert. granted on other grounds, Martin* v. *Wilks,* — U.S. —, 108 S. Ct. 2843 (1988), the court "reject[ed] any notion that the memorialization of [a] voluntary [affirmative action plan] in the form a consent decree somehow provides the employer with extra protection against charges of illegal discrimination." *Id.* at 1501.

Like the employer in *Birmingham,* Petitioners had no right to rely on a consent decree as protection against liability for systematic violations of constitutional rights. The *Tate* v. *Frey* Consent Decree does not have the legal significance required to immunize Petitioners' conduct in this case, and was irrelevant to the "clearly established law" that controlled the Sixth Circuit's decision below.

## CONCLUSION

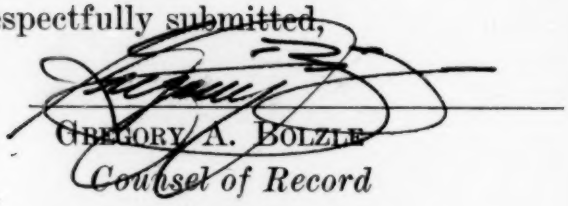
Both the district court and the Sixth Circuit were required to rule as they did by the magnitude of federal and state authority that has found no excuse for blanket strip-searches of minor offenders.

Although Petitioners pay lip-service to the balancing test prescribed by *Bell* v. *Wolfish, supra*, they seek to replace its requirement that the search be *justified* with the mere existence of a consent decree they claim permits blanket strip-searches of minor offenders. *Wolfish's* rule of reason cannot be abandoned on such an arbitrary and potentially abusive basis.

Even more ominous is Petitioners' contention that the agreement they fashioned in *Tate* v. *Frey* has the force of law and shields them from liability for conduct condemned by every published state or federal case addressing the question since 1966. The "clearly established law" cannot be rendered moot by a mere agreement to settle pending litigation unless this Court is willing to surrender fundamental constitutional principles to the "compromise" that "the respective parties have the bargaining power and skill to achieve." *United States* v. *Armour & Co., supra.*

Accordingly, Respondent requests that the Petition be denied.

Respectfully submitted,



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## CERTIFICATE OF SERVICE

I hereby certify that three (3) copies of Respondent's Brief in Opposition were served this 17th day of November, 1989, upon N. Scott Lilly, First Assistant County Attorney, 1001 Fiscal Court Building, Louisville, Kentucky 40202, Counsel for Petitioners, by depositing said documents in a United States Post Office mailbox, first-class postage prepaid, and addressed to the foregoing counsel of record at his above post office address, all in conformity with Supreme Court Rule 28.3. Pursuant to Supreme Court Rule 28.5, all parties required to be served with copies of this Brief have been served.

GREGORY A. BOZZLE
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